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**CTIA**

The Wireless Association®

March 19, 2010

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Portals II, Room TW-A325  
Washington, DC 20554

FILED/ACCEPTED

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MAR 19 2010

Federal Communications Commission  
Office of the Secretary

cc Docket No.  
02-6

**RE: Petition of United States Telecom Association and CTIA--The Wireless Association® for Declaratory Ruling Clarifying Certain Aspects of the "Lowest Corresponding Price" Obligation of the Schools and Libraries Universal Service Program**

Dear Ms. Dortch:

In implementing the National Broadband Plan, the Commission has committed itself to improving its Schools and Libraries Universal Service ("E-Rate") Program, including simplifying the application process. The aim of such improvements will be to make this successful program even better. To be sure, E-Rate has already achieved meaningful results in getting schools and libraries connected to the Internet ecosystem, and the program will play a critical role in further expanding the reach of broadband and enhancing the digital literacy of all Americans. United States Telecom Association and CTIA--The Wireless Association®, together with our members, share the Commission's goal of enhancing E-Rate to make the program more workable for everyone.

During this process, it will be essential for the Commission to ensure that the rules governing the selection, ordering, and provision of E-Rate services are objective and clear. The Commission should expeditiously resolve any existing confusion among program participants on these subjects and, in particular, make certain the Commission's expectations for the pricing of services subject to E-Rate discounts.

In that vein, attached is a joint Petition for Declaratory Ruling with respect to several issues concerning the Commission's "lowest corresponding price" rules for E-Rate services. Although these rules were adopted twelve years ago with the implementation of the E-Rate program, they have been the subject of little regulatory or administrative development. Issues are now arising regarding the scope and meaning of the lowest corresponding price rules that have never been addressed by the Commission or the E-Rate program administrator, the Universal Service Administrative Company. It is necessary for the Commission to address them now to ensure that the program functions as intended.

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The Petition describes how the lowest corresponding price rules should be interpreted and applied pursuant to the underlying purposes of the E-Rate program and its existing regulatory structure. The guidance sought will substantially reduce, if not eliminate, disputes and questions among program participants and those responsible for program oversight regarding the nature, scope, and timing of the requirements. This will bring more specificity and predictability to the program. As the Commission undertakes important work to update E-Rate for the broadband future, we believe that a proceeding initiated by this Petition will help flesh out some of the issues that need to be addressed in this area and also help to improve the schools and libraries program going forward.

Sincerely yours,



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

Petition of United States Telecom Association  
and CTIA-The Wireless Association® for  
Declaratory Ruling Clarifying Certain Aspects  
of the "Lowest Corresponding Price"  
Obligation of the Schools and Libraries  
Universal Service Program

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**PETITION FOR DECLARATORY RULING**

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Dated: March 19, 2010

## SUMMARY

In implementing the Schools and Libraries Universal Service ("E-Rate") Program, the Commission required that eligible schools and libraries seeking E-Rate support invite competitive bids for service and take service pursuant to one of those bids. The purpose of this fundamental requirement of the E-Rate competitive bidding regime was to create an efficient means for schools and libraries to learn about the services available to them and to ensure cost-effective pricing for E-Rate services. To address its concern that the benefits of competitive bidding would be undercut by schools' and libraries' lack of negotiating experience in competitive telecommunications services markets, the Commission adopted a "lowest corresponding price" obligation for service providers<sup>1</sup> and indicated that the lowest corresponding price would set the ceiling on a service provider's competitive bid. In order to provide certainty for all concerned, the Commission should clarify that the lowest corresponding price obligation, among other things, applies only to submitted competitive bids and is not a continuing obligation on providers during the term of any contracts or in other circumstances such as when E-Rate beneficiaries independently choose to purchase services from tariffs, through retail outlets, or under existing state master contracts. These clarifications follow directly from the E-Rate rules and, moreover, ensure that the E-Rate program continues to operate effectively and efficiently.

The lowest corresponding price obligation has not been the subject of any Commission or Bureau order to modify or clarify that requirement since August 1998, when the Common Carrier Bureau determined that certain rates need not be considered in calculating a lowest

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<sup>1</sup> 47 C.F.R. § 54.500(f) (defining the lowest corresponding price as "the lowest price that a service provider charges to non-residential customers who are similarly situated to a particular school, library, or library consortium for similar services").

corresponding price. Since then, the practices of E-Rate beneficiaries, providers, and administrators, and the evolution of the E-Rate funding process more broadly has created uncertainty surrounding the lowest corresponding price obligation that warrants Commission clarification. For example, eligible schools and libraries sometimes select services from “non-bidding” providers based on publicly available service offerings, such as tariffs, state master contracts, or retail rates at wireless stores. In those circumstances, service providers often do not even know that their customers are E-Rate eligible customers or that those customers are purchasing such services using E-Rate funding until the customer has already identified the services it intends to order, chosen a provider, and/or applied for funding. Sometimes, the customers will have gone so far as to have ordered the services.

The Administrator of the E-Rate program—the Universal Service Administrative Company (“USAC”)—recently began to test for lowest corresponding price compliance in some audits. This activity draws attention to a number of open questions regarding the rule. Therefore, Petitioners respectfully request that the Commission clarify five aspects of the lowest corresponding price obligation. As explained herein, these understandings of the lowest corresponding price obligation follow from the plain language, purpose, and structure of the E-Rate rules, the Commission’s E-Rate orders, and the governing statute for the E-Rate program.

*First*, the Commission should clarify that the lowest corresponding price obligation applies only to competitive bids submitted by a provider in response to a Form 470. The obligation should not, and cannot, apply in the absence of a formal bid submitted by a provider in response to a Form 470, such as when E-Rate beneficiaries independently choose to purchase services from tariffs, through retail outlets, or under existing state master contracts. This proposition is compelled by the fact that the entire E-Rate program is based on the fundamental

requirement that schools and libraries desiring E-Rate support follow a competitive bidding process and ultimately take their services from a submitted competitive bid. Limiting the lowest corresponding price obligation to submitted competitive bids also ensures that providers have timely and fair notice of the obligation, is consistent with congressional intent, and comports with the Commission's original reasons for adopting the lowest corresponding price obligation.

*Second*, the Commission should clarify that the lowest corresponding price obligation is not a continuing obligation that entitles a school or library to a constantly recalculated lowest corresponding price during the term of a contract. Nothing in the text of the lowest corresponding price rules supports the notion that the lowest corresponding price obligation is a continuing obligation, and, in fact, the Commission has made clear that the proper mechanism for updating an E-Rate price is a new competitive bidding process and a new or amended contract. Indeed, a continuing lowest corresponding price obligation would be unworkable as a practical matter and also inconsistent with a number of other E-Rate rules.

*Third*, the Commission should clarify that there are no specific procedures that a service provider must use to ensure compliance with the lowest corresponding price obligation. No rule or Commission precedent requires a service provider to use specific compliance procedures. The rule setting forth the obligation speaks only to an outcome—that providers shall not charge a price higher than the lowest corresponding price—not to any procedures designed to ensure that outcome. Nor would it, in any event, be practical or necessary to mandate a standardized compliance process because providers of E-Rate services, as well as beneficiaries, vary in size, location, sophistication, market focus, and technologies used and services offered.

*Fourth*, the Commission should clarify that, in determining whether a service bundle complies with the lowest corresponding price obligation, discrete elements in such bundles need

not be priced and compared to discrete elements of other bundles or stand-alone offerings. The best reading of the rules is that the lowest corresponding price need only be based on prices for a similar *set* of services.

*Fifth*, the Commission should clarify that, in a challenge regarding whether a provider's bid satisfies the lowest corresponding price obligation, the initial burden falls on the challenger (*i.e.*, a school or library) to demonstrate a *prima facie* case that the offer was not the lowest corresponding price. Because the lowest corresponding price obligation closely resembles the non-discrimination requirement applicable to all common carriers, the burden-shifting analysis used in Section 202(a) cases should also apply to the lowest corresponding price obligation.

The Commission's rules provide that the Commission may issue a declaratory ruling to remove uncertainty, and the Commission has also recognized that timely guidance is essential to the universal service programs. The requested clarifications will both remove uncertainty and provide needed and timely guidance to all interested parties.

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Petition of United States Telecom Association  
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Docket No. \_\_\_\_\_

**PETITION FOR DECLARATORY RULING**

Pursuant to 47 C.F.R. § 1.2, United States Telecom Association and CTIA–The Wireless Association® (collectively “Petitioners”) respectfully request a Declaratory Ruling clarifying certain aspects of the “lowest corresponding price” obligation of the Schools and Libraries Universal Service (“E-Rate”) Program. Specifically, Petitioners request that the Commission clarify that:

- (1) the lowest corresponding price obligation applies only to competitive bids submitted by a provider in response to a Form 470;
- (2) the lowest corresponding price obligation is not a continuing obligation that entitles a school or library to a constantly recalculated lowest corresponding price during the term of a contract;
- (3) there are no specific procedures that a service provider must use to ensure compliance with the lowest corresponding price obligation;
- (4) in determining whether a service bundle complies with the lowest corresponding price obligation, discrete elements in such bundles need not be individually compared and priced;
- (5) in a challenge regarding whether a provider’s bid satisfies the lowest corresponding price obligation, the initial burden falls on the challenger (*i.e.*, a school or library) to demonstrate a *prima facie* case that the bid is not the lowest corresponding price.

The lowest corresponding price obligation on service providers has not been the subject of any Commission or Bureau order to modify or clarify that requirement since August 1998, when the Common Carrier Bureau determined that certain rates need not be considered in calculating a lowest corresponding price. Recent activity in this area has created uncertainty that warrants Commission clarification. The requested clarifications are based on the plain language, purpose, and overall structure of the E-Rate program and would provide needed and timely guidance to all interested parties.

## **I. BACKGROUND**

### **A. Section 254 of the Communications Act**

In the Telecommunications Act of 1996 (“1996 Act”),<sup>2</sup> Congress added a new Section 254 to the federal Communications Act, directing “the Commission and states to take the steps necessary to establish support mechanisms to ensure the delivery of affordable telecommunications service to all Americans, including low-income consumers, eligible schools and libraries, and rural health care providers.”<sup>3</sup> Broadly, Section 254 requires that “policies for the preservation and advancement of universal service” be based on six overarching principles, as well as any additional principles that the Commission may adopt as necessary “for the protection of the public interest, convenience, and necessity.”<sup>4</sup> The principles include the mandate that universal service support mechanisms be “specific” and “predictable.”<sup>5</sup>

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<sup>2</sup> Pub. L. No. 104-104, 110 Stat. 56.

<sup>3</sup> *Federal-State Joint Board on Universal Service, Fourth Order on Reconsideration*, 13 FCC Rcd 2372, ¶ 1 (1997) (“*Fourth Universal Service Order on Reconsideration*”).

<sup>4</sup> 47 U.S.C. § 254(b).

<sup>5</sup> *Id.* § 254(b)(5).

With respect to schools and libraries, Section 254(h) sets forth a system for subsidized, discounted rates. The statute provides that “[a]ll telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service ... , provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties.”<sup>6</sup> The appropriate level of discount is left for the Commission and states to determine, and is to be subsidized by the government.<sup>7</sup>

**B. The Commission’s Implementation of Section 254**

In May 1997, the Commission released the *Universal Service Report and Order*, implementing Section 254.<sup>8</sup> Among other things, the Commission adopted a seventh guiding principle of “competitive neutrality” for its universal service policies. The Commission explained that “competitive neutrality means that universal service support mechanisms and rules [shall] neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor or disfavor one technology over another.”<sup>9</sup>

The *Universal Service Report and Order* also promulgated, pursuant to Section 254(h), a set of rules for schools and libraries. The Commission determined what services would be eligible for E-Rate support, and how to calculate the appropriate discount. In addition, it imposed a number of procedural requirements on schools and libraries seeking to avail themselves of the E-Rate discount.

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<sup>6</sup> *Id.* § 254(h)(1)(B).

<sup>7</sup> *Id.*

<sup>8</sup> *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776 (1997) (“*Universal Service Report and Order*”).

<sup>9</sup> *Id.* ¶ 47.

Foremost, the Commission “require[d] that eligible schools and libraries seek competitive bids for all services eligible for section 254(h) discounts.”<sup>10</sup> The Commission took care to impose the requirement at several stages in the process, mandating not only that entities invite competitive bids for service but also that the entities actually consider each bid:

§54.504 Requests for service.

(a) Competitive bidding requirement. All eligible schools, libraries, and consortia including those entities shall participate in a competitive bidding process, pursuant to the requirements established in this subpart ...<sup>11</sup>

....

§54.511 Ordering services.

(a) Selecting a provider of eligible services. In selecting a provider of eligible services, schools, libraries, library consortia, and consortia including any of those entities shall carefully consider all bids submitted ...<sup>12</sup>

The Commission explained that “Congress intended schools and libraries to avail themselves of the growing competitive marketplace for telecommunications and information services,”<sup>13</sup> and “[c]ompetitive bidding is the most efficient means for ensuring that eligible schools and libraries are informed about all of the choices available to them.”<sup>14</sup> In addition, “fiscal responsibility compels us to require that eligible schools and libraries seek competitive bids for all services eligible for [E-Rate] discounts.”<sup>15</sup> That was so, the Commission reasoned,

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<sup>10</sup> *Id.* ¶ 480.

<sup>11</sup> *Universal Service*, 62 Fed. Reg. 32862, 32955 (June 17, 1997) (current version at 47 C.F.R. § 54.504(a)).

<sup>12</sup> *Id.* at 32957 (current version at 47 C.F.R. § 54.511(a)).

<sup>13</sup> *Universal Service Report and Order* ¶ 575.

<sup>14</sup> *Id.* ¶ 480.

<sup>15</sup> *Id.*

because “[a]bsent competitive bidding, prices charged to schools and libraries may be needlessly high, with the result that fewer eligible schools and libraries would be able to participate in the program or the demand on universal support mechanisms would be needlessly great.”<sup>16</sup>

To support implementation of the competitive bidding requirement, the Commission mandated that schools and libraries submit certain information “to enable potential providers to formulate bids.”<sup>17</sup> Noting that Section 254(h) “limits discounts to services provided in response to bona fide requests made for services to be used for educational purposes,”<sup>18</sup> the Commission adopted rules requiring that any entity seeking discounted E-Rate services submit a “request[] for services.”<sup>19</sup> The Commission required that the request include certain factual information pertinent to the provision of services, as well as certain statements certified under oath. The request would then be posted on the “school and library website” and serve as the solicitation for bids.<sup>20</sup> The Commission explained that, by mandating a bona fide request, “Congress intended to require accountability on the part of schools and libraries.”<sup>21</sup> The Commission “decline[d] to impose a requirement that carriers annually notify schools and libraries about the availability of discounted services.”<sup>22</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* ¶ 575.

<sup>18</sup> *Id.* ¶ 570.

<sup>19</sup> *Universal Service*, 62 Fed. Reg. at 32955 (current version at 47 C.F.R. § 54.504(b)).

<sup>20</sup> *Id.*

<sup>21</sup> *Universal Service Report and Order* ¶ 570.

<sup>22</sup> *Id.* ¶ 582.

Having adopted these requirements, however, the Commission also addressed a problem with schools and libraries that were parties to then-existing contracts for services that would fall within the new E-Rate program. Recognizing that these schools and libraries had not known of (and thus did not comply with) the newly-created E-Rate procedures, the Commission grandfathered the then-existing contracts into the E-Rate program.<sup>23</sup> It rejected both the argument that the entities should simply be denied the E-Rate discount and the alternative notion that the contracts should be renegotiated under competitive bidding arrangements.<sup>24</sup> Rather, the Commission provided by rule that “[s]chools and libraries bound by existing contracts for service shall not be required to breach those contracts in order to qualify for discounts under this subpart during the period for which they are bound.”<sup>25</sup> The Commission restricted the scope of this grandfather clause by declining to permit “voluntary extensions” of such contracts to qualify for discounts.<sup>26</sup>

The Commission additionally confronted the concern that the benefits of competitive bidding would be undercut by schools’ and libraries’ “lack of experience in negotiating in a competitive telecommunications service market.”<sup>27</sup> To address this concern, the Commission adopted a “lowest corresponding price” requirement for service providers:

§54.511 Ordering services.

....

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<sup>23</sup> *Id.* ¶ 545.

<sup>24</sup> *Id.* ¶ 547.

<sup>25</sup> *Universal Service*, 62 Fed. Reg. at 32957 (current version at 47 C.F.R. § 54.511(c)).

<sup>26</sup> *Id.*

<sup>27</sup> *Universal Service Report and Order* ¶ 484.

(b) Lowest Corresponding Price. Providers of eligible services shall not charge schools, school districts, libraries, library consortia, and consortia including any of those entities a price above the lowest corresponding price for supported services, unless the Commission, with respect to interstate services or the state commission with respect to intrastate services, finds that the lowest corresponding price is not compensatory.<sup>28</sup>

The Commission explained that the lowest corresponding price “shall constitute the ceiling for [a] carrier’s competitively bid pre-discount price for interstate rates.”<sup>29</sup> And, “[i]n areas in which there is only one bidder, that bidder’s lowest corresponding price would constitute the pre-discount price.”<sup>30</sup> Although the Commission stated that it would adopt a requirement that service providers “certify that the price they offer to schools and libraries is no greater than the lowest corresponding price based on the prices the carrier has previously charged or is currently charging in the market,”<sup>31</sup> it did not actually adopt that requirement. Unlike other certification requirements that the Commission has proposed in the E-Rate context, the Commission never adopted a rule or standardized form for a lowest corresponding price self-certification, nor did it complete the Paperwork Reduction Act process that would have been required to do so.<sup>32</sup>

The Commission defined the lowest corresponding price, by rule, as “the lowest price that a service provider charges to non-residential customers who are similarly situated to a particular school, library, or library consortium for similar services.”<sup>33</sup> The Commission then

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<sup>28</sup> *Universal Service*, 62 Fed. Reg. at 32957 (current version at 47 C.F.R. § 54.511(b)).

<sup>29</sup> *Universal Service Report and Order* ¶ 30.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* ¶ 487.

<sup>32</sup> *Cf.* 47 C.F.R. § 54.504(b), (c), (h) (requiring certain certifications under oath in Forms 470, 471, and 473).

<sup>33</sup> *Universal Service*, 62 Fed. Reg. at 32955 (current version at 47 C.F.R. § 54.500(f)).

provided, in the *Universal Service Report and Order*, limited guidance on how to apply this definition. The lowest corresponding price is associated with a “geographic service area”—the “area in which a telecommunications carrier is seeking to serve customers with any of its [E-Rate] services”—but not necessarily an entire state.<sup>34</sup> Further, in determining the lowest corresponding price, it is necessary to consider both tariff and contract rates<sup>35</sup> offered within the previous three years,<sup>36</sup> but only rates charged for “a similar set of services.”<sup>37</sup> In addition, two customers are not similarly situated if there are “demonstrably and significantly higher costs” to serving one of the customers.<sup>38</sup> Such differing costs might result from tangible factors, such as “mileage from [a] switching facility,” or intangible factors, such as “length of contract.”<sup>39</sup> Finally, a tariffed rate ordinarily will “represent a carrier’s lowest corresponding price in a geographic area in which that carrier has not negotiated rates that differ from the tariffed rate.”<sup>40</sup>

The Commission also provided, in the rules, a specific method for raising questions about the lowest corresponding price for a given service offering and a prescribed mechanism for resolving those questions. Schools and libraries may “seek recourse” from the Commission or state commissions, depending on whether the services are interstate or intrastate, and “request

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<sup>34</sup> *Universal Service Report and Order* ¶¶ 486-87.

<sup>35</sup> *Id.* ¶ 485.

<sup>36</sup> *Id.* ¶ 489.

<sup>37</sup> *Id.* ¶ 488.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* ¶ 491.



lower rates if the rate offered by the carrier does not represent the lowest corresponding price.”<sup>41</sup> Similarly, service providers “may request higher rates if they can show that the lowest corresponding price is not compensatory, because the relevant school, library, or consortium including those entities is not similarly situated to and subscribing to a similar set of services to the customer paying the lowest corresponding price.”<sup>42</sup>

### **C. Subsequent Commission Action Regarding the E-Rate Rules**

After its initial action in the *Universal Service Report and Order*, the Commission has continued in many respects to evolve the E-Rate program. The Commission has determined how to prioritize E-Rate requests when funds are running low<sup>43</sup> and, conversely, what to do when the funds are not entirely disbursed.<sup>44</sup> It has codified how the program administrator, USAC, should process requests for discounts that include both eligible and ineligible services,<sup>45</sup> and it has developed a framework for what amounts should be recovered when funds have been disbursed in violation of specific statutory provisions and Commission rules.<sup>46</sup> The Commission has also

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<sup>41</sup> *Universal Service*, 62 Fed. Reg. at 32955 (current version at 47 C.F.R. § 54.504(e)).

<sup>42</sup> *Id.*

<sup>43</sup> *See Federal-State Joint Board on Universal Service*, Fifth Order on Reconsideration and Fourth Report and Order, 13 FCC Rcd 14915, ¶¶ 32-35 (1998).

<sup>44</sup> *See Schools and Libraries Universal Service Support Mechanism*, First Report and Order, 17 FCC Rcd 11521 (2002); *see also* 47 C.F.R. § 54.507(a)(2).

<sup>45</sup> *See Schools and Libraries Universal Service Support Mechanism*, Second Report and Order, 18 FCC Rcd 9202, ¶¶ 38-41 (2002); *see also* 47 C.F.R. § 54.504(d).

<sup>46</sup> *See Schools and Libraries Universal Service Support Mechanism*, Fifth Report and Order, 19 FCC Rcd 15808, ¶¶ 15-35 (2004) (“*Schools and Libraries Fifth Report and Order*”).

continued to refine the list of eligible services, adding interconnected VoIP and text messaging most recently.<sup>47</sup>

With respect to the competitive bidding requirement, the mandate that schools and libraries submit certified requests for bids, and the lowest corresponding price obligation on service providers, however, there have been few significant developments since the *Universal Service Report and Order*. The Commission has remained firmly committed to the competitive bidding requirement. The current rules still mandate that schools and libraries seeking to participate in the E-Rate program invite competitive bids for service and actually consider each bid. Indeed, the rules now provide that schools and libraries “must select” the most cost-effective bid:

§54.504 Requests for service.

(a) Competitive bid requirements. Except as provided in § 54.511(c), an eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support ...<sup>48</sup>

....

§54.511 Ordering services.

(a) Selecting a provider of eligible services. In selecting a provider of eligible services, schools, libraries, library consortia, and consortia including any of those entities shall carefully consider all bids submitted and must select the most cost-effective service offering.<sup>49</sup>

The Commission has emphasized repeatedly since the *Universal Service Report and Order* that the competitive bidding process “is a key component of the Commission’s effort to ensure that

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<sup>47</sup> See *Schools and Libraries Universal Service Support Mechanism, Report and Order and Further Notice of Proposed Rulemaking*, FCC 09-105, Docket No. 02-6, ¶¶ 11-18 (Dec. 2, 2009).

<sup>48</sup> 47 C.F.R. § 54.504.

<sup>49</sup> *Id.* § 54.511.

universal service funds support services that satisfy the precise needs of an institution, and that the services are provided at the lowest possible rates,”<sup>50</sup> and “is [also] important because it implements the [seventh] principle of competitive neutrality.”<sup>51</sup>

The mandate that schools and libraries submit certified requests for bids similarly remains, though the rules now provide that schools and libraries utilize standard forms throughout the process. To initiate the competitive bidding process, schools and libraries must submit Form 470,<sup>52</sup> on which they must certify under oath that “[a]ll bids submitted will be carefully considered and the bid selected will be for the most cost-effective service ... , with price being the primary factor.”<sup>53</sup> No less than four weeks after a Form 470 has been posted on the E-Rate website, the soliciting entity may make commitments with the selected bidder.<sup>54</sup> Then, “upon signing a contract for eligible services,”<sup>55</sup> the entity must submit a completed Form 471 and certify under oath that “[a]ll bids submitted were carefully considered and the most cost-effective bid ... was selected.”<sup>56</sup>

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<sup>50</sup> *Fourth Universal Service Order on Reconsideration* ¶ 185; see also *Schools and Libraries Fifth Report and Order* ¶ 21.

<sup>51</sup> *Federal-State Joint Board on Universal Service, Order on Reconsideration*, 12 FCC Rcd 10095, ¶ 9 (1997) (“*Universal Service Order on Reconsideration*”).

<sup>52</sup> 47 C.F.R. § 54.504(b).

<sup>53</sup> *Id.* § 54.504(b)(2)(vii).

<sup>54</sup> *Id.* § 54.504(b)(4).

<sup>55</sup> *Id.* § 54.504(c).

<sup>56</sup> *Id.* § 54.504(c)(1)(xi).

It also remains the case that the only exemption from these procedural requirements is the provision grandfathering pre-existing contracts into the E-Rate program.<sup>57</sup> As the Commission has explained, “discounts w[ill] be provided only for those contracts that either compl[y] with the competitive bid requirement or qualif[y] as ‘existing’ contracts under [the] rules.”<sup>58</sup> On at least two occasions, the Commission took specific steps to avoid creating any additional exemption from the competitive bidding requirement. In December 1997, the Commission determined that eligible schools and libraries could take service from a master contract negotiated by a third party, such as a state telecommunications network.<sup>59</sup> The Commission specifically mandated that, “for eligible schools and libraries to receive discounted services, ... the third party initiating [the] master contract either must have complied with the competitive bid requirement or qualify for the existing contract exemption.”<sup>60</sup> Likewise, when the Commission adopted rules in 2003 to allow for mid-contract service substitutions, it deliberately limited the scope of allowable substitutions “to ensure the integrity of the competitive bidding process.”<sup>61</sup> Thus, the relevant rule requires a school or library seeking a mid-contract substitution to “certif[y] that the requested change is within the scope of the controlling FCC Form 470.”<sup>62</sup>

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<sup>57</sup> *Id.* § 54.511(c).

<sup>58</sup> *Fourth Universal Service Order on Reconsideration* ¶ 217.

<sup>59</sup> *Id.* ¶¶ 182-89, 230-35.

<sup>60</sup> *Id.* ¶ 233; *see also* 47 C.F.R. § 54.519(a)(6) (providing that any state telecommunications network initiating a master contract “shall ... [c]omply with the competitive bid requirements set forth in § 54.504(a)”).

<sup>61</sup> *Schools and Libraries Universal Service Support Mechanism*, Third Report and Order, 18 FCC Rcd 26912, ¶ 43 (2003).

<sup>62</sup> 47 C.F.R. § 54.504(f)(1)(iv).

In fact, the Commission has been careful even to limit the scope of the grandfather clause. After the *Universal Service Report and Order*, the Commission repeatedly refined the grandfather clause, in part “[t]o ensure that schools, libraries, and service providers that qualify for [the clause]” do not use it to “avoid the competitive bidding requirement altogether.”<sup>63</sup> The Commission emphasized its “inten[t] to continue to monitor [the] decision to exempt certain preexisting contracts from the competitive bidding requirement, to ensure that the exemption does not reduce the benefits that competitive bidding will provide.”<sup>64</sup>

Finally, the lowest corresponding price obligation on service providers has not been the subject of any further Commission or Bureau order to modify or clarify that requirement since August 1998. The actual text of the three lowest corresponding price rules—the definition,<sup>65</sup> the actual obligation,<sup>66</sup> and the mechanism for raising disputes over a lowest corresponding price<sup>67</sup>—has been largely unchanged since the *Universal Service Report and Order*. The only addition occurred in December 1997, when the Commission slightly amended the rules to require that “[p]romotional rates offered by a service provider for a period of more than 90 days ... be included among the comparable rates upon which the lowest corresponding price is determined.”<sup>68</sup> In the same order promulgating that change, the Commission also re-affirmed the requirement that the lowest corresponding price be based on prices offered within the past three

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<sup>63</sup> *Universal Service Order on Reconsideration* ¶ 9.

<sup>64</sup> *Fourth Universal Service Order on Reconsideration* ¶ 185.

<sup>65</sup> 47 C.F.R. § 54.500(f).

<sup>66</sup> *Id.* § 54.511(b).

<sup>67</sup> *Id.* § 54.504(e).

<sup>68</sup> *Id.* § 54.511(b); see also *Fourth Universal Service Order on Reconsideration* ¶ 143.

years, and clarified that prices offered either “to a customer under a special regulatory subsidy or ... in a contract negotiated under very different conditions” need *not* be considered.<sup>69</sup> In August 1998, the Common Carrier Bureau clarified that rates not lawfully offered under state law also need not be considered in calculating a lowest corresponding price.<sup>70</sup>

Indeed, not only has there been no Commission order touching on the lowest corresponding price obligation since 1998, there has been little to no regulatory activity on the subject at all. There does not appear ever to have been any lowest corresponding price “rate dispute” proceedings or even, until very recently, any audit activity relating to the lowest corresponding price rules. Nor has USAC provided *any* guidance concerning the lowest corresponding price.<sup>71</sup> In short, there has not been material attention to the lowest corresponding price rules essentially since the Commission adopted the rules immediately following the 1996 Act, more than a decade ago.

#### **D. The E-Rate Program in Practice and the Need for Commission Clarification**

Notwithstanding the absence of regulatory activity or guidance regarding the lowest corresponding price rules, the E-Rate market has significantly matured over the past twelve years. The nationwide E-Rate marketplace is characterized by hundreds of competitors providing the widest possible array of communications services; schools and libraries are taking full advantage of that competitive marketplace. After twelve years, schools and libraries no longer lack experience in negotiation in the telecommunications marketplace and, in fact, are

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<sup>69</sup> *Fourth Universal Service Order on Reconsideration* ¶ 141.

<sup>70</sup> *Federal-State Joint Board on Universal Service*, Order, 13 FCC Rcd 14081, ¶ 4 (Common Carrier Bureau 1998).

<sup>71</sup> The lowest corresponding price obligation is neither described, nor even mentioned, in USAC's Service Provider Manual, formerly available at its website at <http://www.sl.universalservice.org/vendor/manual>.

increasingly making use of sophisticated consultants with respect to multiple aspects of the E-Rate program.<sup>72</sup>

In practice, E-Rate services generally are selected and ordered by applicants from service providers, and funded by USAC, based on the following sequence of events:

- An applicant submits a Form 470, identifying the services requested. The posting of the Form 470 opens the competitive bidding process.
- The mandatory 28-day waiting period for the submission of bids runs.
- The applicant evaluates the submitted bids and selects a service provider from those bids based, primarily, on the price offered. When an applicant receives no bids, USAC instructs that the applicant may “contact service providers to solicit bids and ... then review and evaluate any bids received as a result.”<sup>73</sup> Service providers may not be involved in the applicant’s evaluation process.<sup>74</sup>
- Unless the applicant has specifically sought and selected a bid for non-contract tariff or month-to-month services, the applicant establishes a contract relationship with the selected service provider based on the provider’s submitted bid.
- The applicant calculates its E-Rate discount levels, determines its eligible services, and submits a Form 471 to USAC for funding.
- USAC sends a Receipt Acknowledgment Letter to both the applicant and the selected service provider.<sup>75</sup> This letter acknowledges receipt of the Form 471, identifies the

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<sup>72</sup> In addition to the federal rules described here, other factors, such as state and local procurement laws and the existing of legacy service arrangements, govern the way in which applicant-provider relationships are established.

<sup>73</sup> Universal Service Administrative Company, Schools and Library Applicants, Step 4: Construct an Evaluation, <http://www.usac.org/sl/applicants/step04/construct-evaluation.aspx>.

<sup>74</sup> See Universal Service Administrative Company, Service Providers, Step 3: Respond to Applicant Requests for Products and Services, <http://www.usac.org/sl/providers/step03> (“The applicant must take an affirmative role in the evaluation of such bids. The applicant may not delegate this evaluation role to anyone associated with a service provider.”).

<sup>75</sup> See Universal Service Administrative Company, Schools and Library Applicants, Step 7: Submit Application for Support (Form 471), <http://www.usac.org/sl/applicants/step07>.

amount of funding requested, gives reminders and updates about the application process, and provides an opportunity to correct “ministerial and clerical errors.”<sup>76</sup>

- USAC issues a Funding Commitment Decision Letter to both the applicant and service provider. Service providers typically receive commitment decisions for multiple E-Rate applicants in the same letter.
- Initiation of service is confirmed by USAC, the applicant, and the service provider through an exchange of notifications.
- The service provider or the applicant invoices USAC for the portion of charges that will be paid for by the E-Rate program, and USAC will then reimburse the provider.
- The process repeats when the contract period ends. In the case of non-contract tariff or month-to-month services, the process must repeat every year.<sup>77</sup>

Sometimes, however, schools and libraries simply select services from non-bidding providers based on publicly available service offerings, such as tariffs, state master contracts, or retail rates at wireless stores. Although those applicants may contact a service provider’s call center or customer service representative for general information, they do not solicit a competitive bid from the provider, nor are those call centers or representatives equipped to provide an E-Rate-specific bid.<sup>78</sup> Often, it is only when USAC issues a Receipt

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<sup>76</sup> Universal Service Administrative Company, Schools and Library Applicants, Step 7: Form 471 Receipt Acknowledgement Letter, <http://www.usac.org/sl/applicants/step07/receipt-acknowledgement-letter.aspx>.

<sup>77</sup> For a more detailed description of these events, see the USAC website for the Schools and Libraries program. See Universal Service Administrative Company, Schools and Libraries, <http://www.usac.org/sl>.

<sup>78</sup> A general rate quote or other standard pricing information for particular services obtained through such means is not a “bid” or “offer” within the meaning of the E-Rate rules. Indeed, such commercially available terms and conditions are what USAC and the Commission look to in order to assess whether an accepted bid submitted by a provider in response to an applicant’s Form 470 is “cost effective” as required by 47 C.F.R. § 54.511(a). See Universal Service Administrative Company, Schools and Library Applicants, Step 4: Construct an Evaluation, <http://www.usac.org/sl/applicants/step04/construct-evaluation.aspx> (“[I]f you only get one bid, that does not automatically make the bid cost effective. You should review the pricing in the bid response to determine whether the costs for the products and services are



Acknowledgment Letter that a non-bidding provider becomes aware that it has been “selected” to provide E-Rate services.

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The different ways in which the lowest corresponding price obligation may theoretically come into play during the E-Rate process present many unanswered questions. Accordingly, Petitioners respectfully request the Commission clarify that:

- (1) the lowest corresponding price obligation applies only to competitive bids submitted by a provider in response to a Form 470;
- (2) the lowest corresponding price obligation is not a continuing obligation that entitles a school or library to a constantly recalculated lowest corresponding price during the term of a contract;
- (3) there are no specific procedures that a service provider must use to ensure compliance with the lowest corresponding price obligation;
- (4) in determining whether a service bundle complies with the lowest corresponding price obligation, discrete elements in such bundles need not be individually compared and priced;
- (5) in a challenge regarding whether a provider’s bid satisfies the lowest corresponding price obligation, the initial burden falls on the challenger (*i.e.*, a school or library) to demonstrate a prima facie case that the bid is not the lowest corresponding price.

Rule 1.2 of the Commission’s rules provides that the Commission may “issue a declaratory ruling terminating a controversy or removing uncertainty.”<sup>79</sup> Furthermore, the Commission has recognized that “[t]imely guidance [is] important to the efficient and effective administration of

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significantly higher than the costs generally available in the marketplace for the same or similar products or services.”); *see also Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, et al.*, Order, 18 FCC Rcd 26407, ¶ 54 (2003) (“*Ysleta Order*”).

<sup>79</sup> 47 C.F.R. § 1.2.