the USF programs" and has allowed that "[a]ny party ... can file for such guidance at any time."[80]

II. ARGUMENT

A. 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.

For several reasons, the lowest corresponding price obligation should be read to apply to competitive bids submitted by a provider in response to a Form 470. As explained below, this understanding of the rule is compelled by 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.

Principally, the entire E-Rate program is based on the fundamental requirement that schools and libraries desiring E-Rate support take their services from a competitive bid submitted by a provider in response to a Form 470. The E-Rate rules expressly mandate that schools and libraries seeking to participate in the E-Rate program invite competitive bids for service, actually consider each bid, and then select one of those bids. Specifically, Section 54.504(a) mandates that eligible entities "shall seek competitive bids ... for all services eligible for support."[81] Section 54.511(a) provides that, "[i]n selecting a provider," eligible entities "shall carefully consider all bids submitted and must select the most cost-effective service offering."[82] Sections 54.504(b) and (c) require that entities submit Form 470 to initiate bidding,[83] wait at least four weeks to allow for bids to be submitted,[84] certify under oath that all

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80 *See Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, Notice of Inquiry, 23 FCC Rcd 13583, ¶ 30 (2008).

81 47 C.F.R. § 54.504(a).

82 *Id.* § 54.511(a).

83 *Id.* § 54.504(b).

bids submitted "will be"[85] and "were carefully considered,"[86] and further certify that the most cost-effective bid "will be"[87] and "was selected."[88] As the Commission has repeatedly emphasized, "the competitive bidding process is a key component of the schools and libraries program"[89] because it promotes fiscal responsibility, efficiency, accountability, and encourages a flow of information to schools and libraries regarding the services available to them.[90]

Aside from the provision grandfathering into the E-Rate program contracts entered into "before ... the competitive bid system [became] operational,"[91] there are no exceptions in the E-Rate rules to the requirement that services be taken pursuant to a submitted competitive bid. For example, though the rules permit eligible schools and libraries to take service from a master contract negotiated by a state telecommunications network, the rules also require that the state network "[c]omply with the competitive bid requirements."[92] Consistent with this framework,

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84 *Id.* § 54.504(b)(4).

85 *Id.* § 54.504(b)(2)(vii).

86 *Id.* § 54.504(c)(1)(xi).

87 *Id.* § 54.504(b)(2)(vii).

88 *Id.* § 54.504(c)(1)(xi).

89 *Schools and Libraries Fifth Report and Order* ¶ 21; *see also Fourth Universal Service Order on Reconsideration* ¶ 185.

90 *See Ysleta Order* ¶ 22 ("Competitive bidding for services eligible for discount is a cornerstone of the E-rate program, vital to limiting waste, ensuring program integrity, and assisting schools and libraries in receiving the best value for their limited funds.").

91 47 C.F.R. § 54.511(c).

92 *Id.* § 54.519(a)(6).

USAC does not excuse schools and libraries that fail to receive any bids in response to a Form 470, but rather instructs them to take steps to "contact service providers to solicit bids."[93]

As a part of the E-Rate program, the lowest corresponding price obligation must therefore be restricted to competitive bids submitted by a provider in response to a Form 470. The lowest corresponding price obligation sets a ceiling on the prices for E-Rate services.[94] If the entire E-Rate program is limited to services taken pursuant to a submitted competitive bid, it follows that the lowest corresponding price obligation must also be so limited. To hold otherwise would violate the principles underlying the competitive bidding requirement itself, and impose upon providers the affirmative obligation to notify schools and libraries of discounted services that the Commission expressly rejected in the *Universal Service Report and Order*.[95]

In practice, this interpretation means that an eligible school or library desiring E-Rate support must first submit a Form 470.[96] Block 2 of Form 470 provides three options describing the "needs or services requested":

(a) "Tariffed or month-to-month services to be provided without a written contract";

(b) "Services for which a new written contract is sought for the funding year"; and

(c) "A multi-year contract signed on or before 7/10/97 but for which no Form 470 has been filed in a previous funding year."[97]

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

94 47 C.F.R. § 54.511(b).

95 *See Universal Service Report and Order* ¶ 582.

96 *See, e.g.*, Universal Service Administrative Company, Service Providers, Step 4: Applicants Select Service Provider, http://www.usac.org/sl/providers/step04 ("A service provider selected by an applicant after an open and fair competitive bidding process may be providing services under tariff (for telecommunications services only), under a month-to-month arrangement, or under a contract.").

97 *Id.* at 2.

If the school or library checks the boxes for (a) or (b), or both, any competitive bids submitted in response are subject to the lowest corresponding price obligation.[98] If the school or library checks the box for (c), it will be taking service from a contract grandfathered into the E-Rate program, is not seeking competitive bids, and thus the lowest corresponding price obligation plainly does not attach. If the school or library takes service outside the competitive bidding process—that is, not in response to an affirmative bid submitted by a provider—the lowest corresponding price obligation also does not attach to any prices or offers it receives.[99]

Second, limiting the lowest corresponding price obligation to submitted competitive bids is the only way to ensure that providers have timely and fair notice of the obligation. When a provider submits a bid in response to a Form 470, it has notice before prices are finalized that it is in the E-Rate program and may not offer a price higher than the lowest corresponding price. By contrast, when a school or library decides to take service from a non-bidding provider based on publicly available service offerings (such as tariffs, state master contracts, or retail rates at wireless stores), that non-bidding provider often is not even aware that it has been selected to provide E-Rate service until after the Form 470 process is closed or even after an applicant files its Form 471. At either stage, pricing has been finalized. Even assuming that a lower price were available from the non-bidding provider, a change in pricing is not a "ministerial and clerical

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98 If a school or library checks the box for (a) and is seeking tariffed services, the lowest corresponding price obligation on any competitive bids submitted in response is, in practical effect, merely a formality. A provider that offers its tariffed rate in response to a school or library seeking tariffed services will, by definition, satisfy the rule.

99 Nonetheless, even outside the competitive bidding process, a school or library is likely to obtain the "lowest corresponding price." A tariff or other service offered outside the competitive bidding process pursuant to widely available terms and conditions would almost certainly meet the lowest corresponding price standard. *See infra* pp. 24-25.

error" that could be corrected at that time.[100] To the contrary, as the Commission has explained, a "cardinal change" to a contract requires the initiation of a brand new bidding process.[101] The Commission has specifically held that the specific E-Rate services an applicant intends to order from the selected providers, as well as the pricing for those services, are not subject to further negotiation after the Form 470 process is complete.[102]

Third, the governing statute for the E-Rate program makes clear that providers shall provide E-Rate supported services at the E-Rate price only "upon a *bona fide request*,"[103] and it was to effectuate that "limit[ation] [on] discounts to services" that the Commission ultimately adopted Form 470.[104] As the Commission explained, "Congress intended to require accountability on the part of schools and libraries."[105] It is thus consistent with congressional intent to limit the lowest corresponding price obligation to competitive bids submitted by a provider *in response to* a Form 470.[106]

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100 *See* Universal Service Administrative Company, Schools and Library Applicants, List of Correctable Ministerial and Clerical Errors, http://www.usac.org/_res/documents/sl/pdf/List-of-Correctable-Ministerial-and-Clerical-Errors.pdf.

101 *See Fourth Universal Service Order on Reconsideration* ¶¶ 224-28.

102 *See Ysleta Order* ¶¶ 24-28.

103 47 U.S.C. § 254(h)(1)(B) (emphasis added).

104 *Universal Service Report and Order* ¶ 570.

105 *Id.* ¶ 575.

106 *See, e.g., Shepherd v. Merit Systems Protection Bd.*, 652 F.2d 1040, 1043 (D.C. Cir. 1981) ("[W]e must overturn agency action and interpretation inconsistent with the regulations and statutes themselves.").

In addition, the statute requires that universal service support mechanisms be "specific" and "predictable."[107] If the lowest corresponding price obligation were to apply to non-bidding providers, the requirement would be unworkable. Even were they to devote extraordinary resources to monitoring all of their sales to identify E-Rate customers in order to offer lowest corresponding prices, non-bidding providers simply could not reliably do so. Moreover, it would be impossible to make a complete and thorough determination of the lowest corresponding price at the point-of-sale, in the thousands of retail environments across the nation, for each purported E-Rate customer. It is inconceivable that, in requiring specificity and predictability, Congress intended to mandate such a vast commitment of resources to achieve what would amount to widely varied and wholly inconsistent results.

Fourth, the Commission's original discussion of the lowest corresponding price obligation in the *Universal Service Report and Order* further suggests that the obligation should apply only to submitted competitive bids. When the Commission first introduced the lowest corresponding price obligation, it did so specifically to ensure that the competitive bids submitted by potential providers did not take advantage of schools' and libraries' "lack of experience in negotiating in a competitive telecommunications service market."[108] The Commission created the lowest corresponding price to establish a "ceiling for [a] carrier's competitively bid pre-discount price for interstate rates."[109] "In areas in which there is [sic] only one bidder," the Commission envisioned that the lowest corresponding price "would constitute

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107 47 U.S.C. § 254(b)(5).

108 *Universal Service Report and Order* ¶ 484.

109 *Id.* ¶ 30.

the [bidder's] pre-discount price."[110] The lowest corresponding price obligation thus was always intended precisely to protect services taken pursuant to a submitted competitive bid.

Similarly, the Commission's rules regarding disputes over the lowest corresponding price specifically refer to "rate[s] *offered*."[111] The rule provides that "[s]chools, libraries and consortia including those entities may request lower rates if the rate *offered* by the carrier does not represent the lowest corresponding price."[112] This rule plainly contemplates that the lowest corresponding price obligation applies only to submitted competitive bids.[113]

Finally, restricting the lowest corresponding price obligation to submitted competitive bids would not present any risks for schools and libraries that voluntarily elect to purchase service by other means, such as pursuant to federal or state-wide contracts, under generally available tariffed wireline services, or at wireless retail operations. Contracts negotiated on behalf of a state are based on the pooled purchasing power and negotiating expertise of the entire state's governmental entities, and are typically highly efficient and cost-effective means for schools and libraries when purchasing service.[114] Federal contracts entered into by the General Services Administration are also efficient and cost-effective means of procuring service. In any event, the services provided pursuant to these contracts, as well as those for tariffed wireline and

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110 *Id.*

111 47 C.F.R. § 54.504(e)(1) (emphasis added).

112 *Id.* (emphasis added).

113 This rule also suggests that any "lowest corresponding price" dispute should occur at the *pre-contractual* stages of the E-Rate transaction, when a rate may still be considered an "offer," not after a contract has been finalized.

114 In the case of master contracts negotiated by state telecommunications networks under the E-Rate rules, of course, those contracts are subject to the competitive bidding requirements and thus receive the benefit of the lowest corresponding price obligation. *See id.* § 54.519(a)(6).

general wireless services, are covered by the general non-discrimination obligation of common carriers under Section 202(a). This obligation, much like the lowest corresponding price rule, independently ensures that similar parties are treated similarly.[115]

B. 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 kind of floating, durable lien that re-sets itself within the term of any contract. The definition of the lowest corresponding price is:

> 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.[116]

And the lowest corresponding price obligation reads:

> §54.511 Ordering services.
>
> ....
>
> (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. Promotional rates offered by a service provider for a period of more than 90 days must be included among the comparable rates upon which the lowest corresponding price is determined.[117]

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115 *See infra* p. 1.

116 47 C.F.R. § 54.500(f).

117 *Id.* § 54.511(b).

The rules do not include any continuing obligation to recalculate the lowest corresponding price over the life of a contract. To the contrary, the plain language suggests that there is a single "lowest corresponding price" for any given provider-customer relationship.

In fact, the Commission's discussion of master contracts makes clear that the mechanism for updating an E-Rate price is a new competitive bidding process, not some sort of continuing lowest corresponding price obligation on providers. In allowing schools and libraries to take service from master contracts negotiated under the E-Rate competitive bidding requirements, the Commission expressly cautioned that the price terms in the master contract could be outdated. The Commission encouraged schools and libraries that it might sometimes be sensible to "issue new requests for bids ... , rather than obtain service under the terms of [a] master contract,"[118] because "a master contract that was put out for bid several years ago but has not yet expired might not reflect the cost reductions resulting from recent entry into the local exchange market by, for example, wireless carriers."[119] If the lowest corresponding price obligation was a continuing requirement, the price terms in master contracts negotiated under the E-Rate bidding requirements could never be outdated.

What is more, a continuing lowest corresponding price obligation would be unworkable as a practical matter, and thus also run afoul of the above-discussed statutory requirement that universal service support mechanisms be "specific" and "predictable."[120] Providers would need to devote massive resources to reviewing all existing customer relationships upon each new engagement. Under such a scenario, no contract would ever be final. This would create not just

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118 *Fourth Universal Service Order on Reconsideration* ¶ 234.

119 *Id.*

120 47 U.S.C. § 254(b)(5).

an unwarranted administrative burden, but would be in direct tension with the clear preference of the Commission for the use of competitive bidding as the means to effectuate material changes in existing contracts.

In addition, a continuing lowest corresponding price obligation would be inconsistent with a number of other E-Rate rules.[121] Foremost, the entire competitive bidding scheme mandated by Sections 54.504(a) and 54.111(a) is premised on service providers committing, in the bidding process, to a single price. That "pre-discount price" is "the primary factor" that schools and libraries are to use in determining which bid to select.[122] Indeed, the offered price is so significant that service providers must certify under oath that they arrived at their offer price independently and did not disclose the price to any other offeror while bidding was still possible.[123] A continuing lowest corresponding price obligation that would result in a changing price *after* a bid is selected would render the entire bidding and selection process meaningless.

Several other E-Rate rules make clear that, after a bid is selected, the service provider and the eligible entity are to enter into a binding contract with a fixed "pre-discount" price for the services. Section 54.504(c) provides that Form 471 is to be submitted after the bid process and "upon signing a contract for eligible services."[124] Further, the rules allowing for mid-contract service substitution describe the possibility of a "change in the pre-discount price for the supported service," and set forth the procedure for determining what shall be the fixed "pre-

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121 *See, e.g., Davis v. Latschar*, 202 F.3d 359, 365 (D.C. Cir. 2000) ("[A]n agency's interpretation of its own regulations will prevail unless it is plainly erroneous or inconsistent with the plain terms of the disputed regulations." (internal quotation marks omitted).

122 47 C.F.R. § 54.511(a).

123 *Id.* § 54.504(h).

124 *Id.* § 54.504(c).

discount" price going forward.[125] None of these rules can be squared with the idea of a constantly changing price for services.

Lastly, the E-Rate rules contemplate that schools and libraries will apply one time per year for their discount based off of the set "pre-discount price." Section 54.505(a) provides that "[d]iscounts for eligible schools and libraries shall be set as a percentage discount from the pre-discount price,"[126] and Section 54.507(d) provides that "[s]chools and libraries, and consortia of such eligible entities shall file new funding requests for each funding year."[127] A continuing lowest corresponding price obligation would make it impossible for schools and libraries to comply with these rules and create significant difficulties for USAC in the disbursement of funds.

C. 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.

There is no rule or even any Commission precedent that requires a service provider to use specific procedures to ensure compliance with the lowest corresponding price obligation. The rule setting forth the obligation states only that "[p]roviders 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."[128] It does not require a particular compliance procedure; it speaks only to an outcome.

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125 *Id.* § 54.504(f).

126 *Id.* § 54.505(a).

127 *Id.* § 54.507(d).

128 *Id.* § 54.511(b).

At most, service providers are required under the E-Rate rules to "retain documents related to the delivery of discounted telecommunications and other supported services for at least 5 years after the last day of the delivery of discounted services."[129] The rule also mandates that "[a]ny other document that demonstrates compliance with the statutory or regulatory requirements for the schools and libraries mechanism ... be retained as well."[130] But those document retention requirements do not specify that any particular documents are required to demonstrate compliance with the lowest corresponding price obligation.

In the *Universal Service Report and Order*, the Commission stated that it would adopt a requirement that service providers certify "the price they offer to schools and libraries is no greater than the lowest corresponding price,"[131] but never actually adopted the requirement. Even that proposed requirement, however, did not speak to any particular compliance procedures. It would have required a certification only as to an outcome.

Moreover, it would not make sense for the Commission to mandate a particular compliance process. E-Rate service providers vary by size, location, sophistication, market focus, technologies used, and services offered, among other things. In turn, there is significant variability among E-Rate beneficiaries. A "one-size-fits-all" process simply is not practical. Nor has a standardized compliance process proven itself necessary. Rather, given the Commission's oft-stated policy goal that schools and libraries receive bids at the lowest corresponding price, whether schools and libraries actually receive such bids ought to be the controlling factor. What should matter is that schools and libraries were in fact provided bids

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129 *Id.* § 54.516(a).

130 *Id.*

131 *Universal Service Report and Order* ¶ 487.

from service providers containing the lowest corresponding price, not the process by which the service providers arrived at theirs respective bids.

D. 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 Individually Compared and Priced.

Section 54.500(f) defines 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*."[132] Section 54.504(f)(2) provides that the lowest corresponding price may be considered "not compensatory" if "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."[133] Further, in the *Universal Service Report and Order*, the Commission expressly "clarif[ied] that a provider of telecommunications services, Internet access, and internal connections need not offer the same lowest corresponding price to different schools and libraries in the same geographic service area if they are not similarly situated and subscribing to a *similar set of services*."[134]

Read together, these provisions indicate that the only sensible understanding of the lowest corresponding price is that it need only be based on prices for a similar *set* of services. The Commission's repeated use of the phrase "similar set of services" cannot simply be ignored. In practical effect, the phrase "similar set of services" plainly contemplates that bundles of services (for example, a multi-line business service with various features such as caller identification, conference calling, etc.) can be treated as bundles and need not be disaggregated

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132 47 C.F.R. § 54.500(f) (emphasis added).

133 *Id.* § 54.504(f)(2) (emphasis added).

134 *Universal Service Report and Order* ¶ 488 (emphasis added).

or individually priced for purposes of determining the lowest corresponding price. Of course, the requirement that "set[s] of services" be "similar" must also mean that a lowest corresponding price for one bundle or combination of services need not be based on prices for bundles or combinations of different services or services with different feature sets.

E. 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 Bid Is Not the Lowest Corresponding Price.

The lowest corresponding price obligation closely resembles the non-discrimination requirement imposed on all common carriers. Section 202(a) of the Communications Act makes it "unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with *like communication service*."[135] This obligation "is normally interpreted as requiring that carrier offerings be generally available to all similarly situated customers."[136] In comparison, the lowest corresponding price obligation mandates that "[p]roviders of eligible services shall not charge schools, school districts, libraries, library consortia, and consortia including any of those entities a price above"[137] 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."[138]

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135 47 U.S.C. § 202(a) (emphasis added).

136 *Local Exchange Carriers' Individual Case Basis DS3 Service Offerings*, 4 FCC Rcd 8634, ¶ 66 (1989).

137 47 C.F.R. § 54.511(b).

138 *Id.* § 54.500(f).

Because the standards are so alike, the Commission should clarify that the burden-shifting analysis it uses in Section 202(a) cases also applies to the lowest corresponding price obligation. For Section 202(a), "[a] complainant alleging that a carrier has engaged in unlawful discrimination ... must make a prima facie showing that the carrier has discriminated in connection with a 'like communication' service or has given an 'advantage or preference' to a person or group of person in connection with such service."[139] Once the complainant has made a prima facie showing, the burden shifts to the carrier to "show that the discrimination or preference is justified and, therefore, reasonable."[140] In the E-Rate context, the Commission should require that any complainant alleging that a service provider has failed to comply with its lowest corresponding price obligation must make a prima facie showing that the service provider had provided a lower price to similarly situated parties for similar services within the relevant time period. Once the complainant has made a prima facie showing, the burden would shift to the service provider to justify its lowest corresponding price calculation.

F. If the Commission Disagrees with Petitioners' Requests for Clarification, Any Contrary Interpretations of the E-Rate Rules Must Be Prospective Only.

The D.C. Circuit has made clear that a regulation provides fair notice consistent with fundamental principles of due process only if "a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties

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139 *RCI Long Distance, Inc. v. New York Tel. Co.*, Memorandum Opinion and Order, 11 FCC Rcd 8090, ¶ 37 (2006).

140 *Id.*

to conform."[141] Absent fair notice, the agency may not impose any penalty for past conduct, including a finding of liability.[142]

No standards of conduct contrary to the clarifications that Petitioners have requested are contained on the face of any regulation or order or reasonably ascertainable from any regulation or order. Should the Commission choose to adopt any contrary interpretations that impose new or additional burdens on service providers, Petitioners cannot be deemed to have had fair notice of those. Accordingly, any such interpretation may not serve as the basis for any sanctions for past conduct, including any finding of liability or fines, and instead must be limited to purely prospective effect.

CONCLUSION

For the foregoing reasons, the Commission should clarify the lowest corresponding price obligation of the E-Rate program in the several ways requested by Petitioners. Such clarifications follow from the plain language of the E-Rate rules, the Commission's E-Rate orders, and the governing statute for the E-Rate program, and would provide needed and timely guidance in light of recent developments.

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141 *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000).

142 *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

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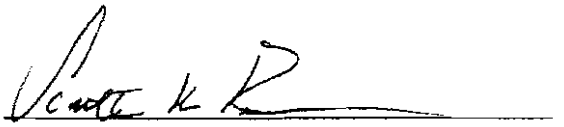

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