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FCC Mail Room

Before the
Federal Communications Commission
Washington, DC 20554

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In the Matter of	)	78733
	)	
Schools and Libraries Universal Service Support Mechanism	)	CC Docket No. 02-6
	)	

ORDER AND NOTICE OF PROPOSED RULEMAKING

Adopted: February 18, 2010 **Released: February 19, 2010**

Comment Date: (30 days after publication in the Federal Register)
Reply Comment Date: (45 days after publication in the Federal Register)

By the Commission: Chairman Genachowski and Commissioners Copps, McDowell and Clyburn issuing separate statements

I. INTRODUCTION

1. This item enables schools that receive funding from the E-rate program (more formally, the schools and libraries universal service support program) to allow members of the general public to use the schools' Internet access during non-operating hours. In the order, we waive, on our own motion and through funding year 2010 (which ends June 30, 2011), rules that currently discourage public use of resources funded by E-rate.[1] In the notice of proposed rulemaking (NPRM), we seek comment on revising our rules to make the change permanent. This change will leverage universal service funding to serve a larger population at no increased cost to the E-rate program. The general public will be able to use the Internet access already present in schools, at the schools' discretion, for purposes such as job searches and applications, digital literacy programs, and online access to governmental services and resources.

2. Currently, Commission rules require schools to certify that they will use E-rate funded services solely for educational purposes, defined as activities that are integral, immediate, and proximate to the education of students. As a result, services and facilities purchased by schools using E-rate funding remain largely unused during evenings, weekends, school holidays, and summer breaks. Waiving the relevant rules will maximize the use of facilities and services supported by E-rate by giving schools the option to open their E-rate funded facilities to members of the public during non-operating hours. Increasing community access to the Internet is particularly critical to communities in which residential adoption of broadband Internet access has historically lagged, including many rural, minority, and Tribal communities. Moreover, the waiver we grant today is consistent with the use of E-rate funding by libraries, which provide Internet access to members of the general public as part of their mission. Finally, by making Internet access available to more members of the public, this waiver furthers the goals of universal service and the congressional directive to encourage access to advanced telecommunications and information services.[2]

3. We limit this waiver to the 2009 and 2010 funding years, ending on June 30, 2011. This waiver is subject to the following conditions: (1) schools participating in the E-rate program are not

[1] *See* 47 C.F.R. §§ 54.504(b)(2)(v); 54.504(c)(1)(vii).

[2] *See* 47 U.S.C. § 254(b).

permitted to request more services than are necessary for "educational purposes";[3] (2) any community use of E-rate funded services at a school facility is limited to non-operating hours, such as after school hours or during times when the students are out of school; and (3) consistent with the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the Act), schools' discounted services or network capacity may not be "sold, resold, or transferred by such user in consideration for money or any other thing of value."[4] In the NPRM, we seek comment on revising our rules to enable schools to allow the use of services and equipment funded under the E-rate program by the community during non-operating school hours. We also seek comment on conditions that should be established to guard against potential additional costs being imposed on the E-rate program and to reduce the likelihood of waste, fraud, and abuse.

II. BACKGROUND

4. Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible telecommunications services, Internet access, internal connections, and basic maintenance of internal connections.[5] The Act provides that discounts should be given to eligible schools and libraries for educational purposes.[6] To implement this provision, in the *Universal Service First Report and Order*, the Commission required schools and libraries to certify, among other things, that services obtained through discounts from the E-rate program would be used solely for "educational purposes."[7] The Commission noted that all of the certification requirements were intended to encourage accountability on the part of schools and libraries.[8] Subsequently, in the *Schools and Libraries Second Report and Order*, the Commission clarified the meaning of "educational purposes" as "activities that are integral, immediate, and proximate to the education of students, or in the case of libraries, integral, immediate, and proximate to the provision of library services to library patrons."[9] As a result, use of services and facilities funded by E-rate for non-educational purposes would not be an eligible use, and schools are required to reduce their funding request by the amount of the ineligible use.[10]

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[3] *See* 47 C.F.R. § 54.500(b) (defining "educational purposes" as "activities that are integral, immediate, and proximate to the education of students, or in the case of libraries, integral, immediate, and proximate to the provision of library services to library patrons.").

[4] 47 U.S.C. § 254 (h)(1)(B).

[5] 47 C.F.R. §§ 54.501-54.503.

[6] 47 U.S.C. § 254 (h)(1)(B).

[7] 47 C.F.R. § 54.504(b)(2)(v) (requiring applicants to certify on their FCC Form 470 that services obtained through discounts from the E-rate program would be used solely for educational purposes); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9079, para. 577 (1997) (*Universal Service First Report and Order*), *aff'd in part, rev'd in part, remanded in part sub nom, Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. denied*, 530 U.S. 1210 (2000), *cert. dismissed*, 531 U.S. 975 (2000). This requirement was originally codified in section 54.504(b)(2)(ii) of the Commission's rules. *See* 47 C.F.R. § 54.504(b)(2)(ii) (1998). Subsequently, in the *Schools and Libraries Fifth Report and Order*, the Commission codified the requirement that applicants must also certify on their FCC Form 471 that services obtained through discounts from the E-rate program would be used solely for educational purposes. *See Schools and Libraries Universal Service Support Mechanism*, CC Docket 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15831, para. 68 (2004); 47 C.F.R. § 54.504(c)(1)(vii).

[8] *Universal Service First Report and Order*, 12 FCC Rcd at 9076, para. 570.

[9] *Schools and Libraries Second Report and* Order, 18 FCC Rcd at 9208, paras. 17-18; 47 C.F.R. § 54.500(b).

[10] 47 C.F.R. § 54.504(g).

5. In the *Alaska Order*, the Commission granted a limited waiver of section 54.504(b)(2)(v) of the Commission's rules to the State of Alaska to allow members of certain rural remote communities in Alaska to use excess service obtained through the E-rate program when the services were not in use by Alaskan schools and libraries.[11] In granting this waiver to the State of Alaska, the Commission found that nothing in the Act prohibited it from granting a waiver of the "educational purposes" certification to expand the use of such services so long as, in the first instance, they are used for educational purposes.[12] Thus, the Commission granted the State of Alaska's waiver request dependent upon the implementation of certain conditions, including that any use of underutilized service by the community would be limited to non-operating hours.[13] The Commission found that, consistent with the Act, maximizing the use of services obtained from the E-rate program by permitting such rural remote communities to use the excess service furthered the goals of universal service.[14]

6. In November 2009, the Commission sought comment on various issues related to broadband access and usage in education as part of the Commission's development of a national broadband plan.[15] In addition, the Commission sought comment on how it could modify the E-rate program to improve broadband deployment to schools and libraries and how the program could be a vehicle to stimulate the adoption of broadband more widely in communities.[16] The Commission also sought comment on whether and how the E-rate program could be structured to more effectively distribute available funding.[17] As part of this public notice seeking comment on issues related to the E-rate program, the Commission specifically sought comment on whether the program could be modified to allow for the use of broadband facilities at schools by the general community rather than just by students

[11] *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*, CC Docket No. 96-45, Order, 16 FCC Rcd 21511 (2001) (*Alaska Order*). As noted above, this requirement was originally codified in section 54.504(b)(2)(ii) of the Commission's rules. *See supra* n.7; 47 C.F.R. § 54.504(b)(2)(ii) (1998). In granting Alaska's waiver request, the Commission: (1) limited the application of the waiver to Alaskan communities where there was no local or toll-free dial-up Internet access; (2) disallowed eligible schools and libraries from requesting more services than were necessary for educational purposes; (3) limited the waiver to communities where the services used by the schools were purchased on a non-usage sensitive basis; (4) limited local community usage to hours in which the school or library was not open; and (5) provided that excess services were to be made available to all capable service providers in a neutral manner that did not require or take into account any commitments or promises from the service providers. *Id.* at 21516-18, paras. 12-17.

[12] *Id.* at 21514-15, para. 8.

[13] *Id.* at 21516-18, paras. 12-18.

[14] *Id.* at 21514, para. 7; 47 U.S.C. § 254; *see also* Section 706 of the Act, reproduced in the notes under 47 U.S.C. § 157. Section 706 directs the Commission and the states to utilize various regulatory methods to "encourage deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans[.]"

[15] *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, National Broadband Plan Public Notice #15, Comment Sought on Broadband Needs in Education, Including Changes to E-rate Program to Improve Broadband Deployment, DA 09-2376 (rel. Nov. 3, 2009) (NBP Public Notice #15).

[16] *Id.*

[17] *Id.*

and faculty.[18] Comments were due by November 20, 2009, and reply comments were due by December 11, 2009.[19]

III. DISCUSSION

7. For the reasons discussed below, we grant, on our own motion, to all schools participating in the E-rate program a waiver of sections 54.504(b)(2)(v) and 54.504(c)(1)(vii) of our rules, which require applicants to certify on their FCC Forms 470 and 471 that the services requested will be used solely for educational purposes.[20] This limited waiver is subject to the conditions discussed below and extends through the close of funding year 2010 (June 30, 2011). Specifically, this waiver allows schools the option to open their facilities to the general public to utilize services and facilities supported by E-rate during non-operating hours, such as after school hours, on the weekends, on school holidays, or during the summer months when schools are not in session, for other purposes, such as adult education, job training, digital literacy programs, and online access to governmental services and resources.[21] We believe that this limited waiver will encourage greater use of schools' Internet access and other supported services while furthering community access to these valuable resources. As a result of this waiver, schools choosing to allow the community to access their services and facilities purchased with E-rate funding will not be required to cost-allocate between community use and school use of the facility.

8. The Commission may waive any provision of its rules on its own motion and for good cause shown.[22] A rule may be waived where the particular facts make strict compliance inconsistent with the public interest.[23] In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[24] In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.[25]

9. We agree with commenters that waiving section 54.504(b)(2)(v) and 54.504(c)(1)(vii) of our rules for less than 18 months for schools participating in the E-rate program satisfies the conditions

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[18] *Id.* at 6; *see also Schools and Libraries Universal Service Support Mechanism*, CC Docket 02-6, Notice of Proposed Rulemaking, 17 FCC Rcd 1914, 1932-33, paras. 45-47 (2002).

[19] *Id.* at 1.

[20] 47 C.F.R. §§ 54.504(b)(2)(v); 54.504(c)(1)(vii).

[21] *See, e.g.*, West Virginia Department of Education (WV DOE) NBP Public Notice #15 Comments at 6-8 (stating that "the education of adults as members of the school community is part of the education mission of schools and adult literacy is critical in that it develops these individuals to become productive members of society"); State E-rate Coordinators Alliance (SECA) NBP Public Notice #15 Comments at 15 and WV DOE NBP Public Notice #15 Comments at 6-8 (citing the No Child Left Behind Title II, Part D, which identifies 12 criteria that must be addressed by schools, specifically, requiring a description of how programs will be developed, where applicable, in collaboration with adult literacy service providers to maximize the use of technology). We note that this waiver applies to community members who access the Internet while on a school's campus. *See Requests for Review of Eagle Hill School, et al., Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-84941, *et al.*, CC Docket No. 02-6, Order, 24 FCC Rcd 12714 (Wireline Comp. Bur. 2009).

[22] 47 C.F.R. § 1.3.

[23] *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

[24] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972). *Accord NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008).

[25] *Northeast Cellular*, 897 F.2d at 1166.

for waiver.[26] Specifically, we believe that this waiver will promote broadband access across the nation and increase the efficiency and cost-effectiveness of services and facilities funded under the E-rate program. We conclude that granting this limited waiver to schools participating in the E-rate program will serve the public interest by promoting community access to available services currently under-utilized after school hours or when schools are closed, such as evenings, weekends, school holidays, or during the summer months. That is, by allowing schools the option to open their networks to the public to use computer rooms and Internet access during non-operating hours for the purpose of job training, tutoring, or other purposes, we will leverage E-rate funding to serve a larger population. We also find that this waiver serves the goals of universal service by making Internet access available to more members of the general public.[27] It is also consistent with the Commission's directive from Congress to encourage access to advanced telecommunications and information services.[28] Further, the waiver is consistent with the use of services funded through E-rate for libraries, which are open to the public for more general purposes, such as access to Internet services.[29]

10. We also conclude that special circumstances exist to justify a waiver of our rules. During this time of high unemployment and limited resources, many people across the nation lack access to or have limited access to affordable Internet services for job training and educational opportunities, particularly in rural, minority, and Tribal communities.[30] Further, many employers no longer accept

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[26] 47 C.F.R. §§ 54.504(b)(2)(v); 54.504(c)(1)(vii). *See generally*, Oregon Department of Education (OR DOE) NBP Public Notice #15 Comments at 6 (recommends allowing community use of the network at school for school-hosted events, non-profit events, such as job fairs, vaccination clinics); Alaska Department of Education and Early Development (AK DOE) NBP Public Notice #15 Comments at 71 (recommends allowing use of school networks as public computer centers after school); American Association of School Administrators and Association of Educational Service Agencies (AASA & AESA) NBP Public Notice #15 Comments at 5 (asserts that students should be able to access the school's network after hours for homework, etc. E-rate should not be expanded to new applicants); Dell, Inc. (Dell) NBP Public Notice #15 Comments at 3-4 (asserts that the use of E-rate subsidized broadband connections should be accessible by the entire community; broad access facilitates employee training, job searches, and other uses that stimulate economic activity); Kellogg and Sovereign Consulting (KS) NBP Public Notice #15 Comments at 8 (believes that expanding access to the general community would make a significant impact on the community as a whole); University of Alaska (Univ. Alaska) NBP Public Notice #15 Comments at 2-3 (supports expanding the definition of "educational purposes" to allow use of E-rate services by communities during non-school hours); Wisconsin Department of Public Instruction (WIDPI) NBP Public Notice #15 Comments at 2-3 (asserts that communities should be allowed to open schools during non-instructional times to provide Internet access for the public); Funds for Learning (FFL) NBP Public Notice #15 Comments at 2-9 (believes that allowing schools the option to open up their networks to the public is good public policy because it allows the full utilization of the E-rate supported broadband and allows community groups to take advantage of the high-speed Internet access); SECA NBP Public Notice #15 Comments at 11 (recommends that schools be given the option to expand the use of their E-rate subsidized computer facilities after hours and allow them to be used as public computing centers; this is one way to leverage E-rate resources and increase broadband access nationwide); WV DOE NBP Public Notice #15 Comments at 6-11 (supports expanding eligible use of Internet access within schools to allow schools to continue their mission of education within the community); National Association of Telecommunications Officers and Advisors (NATOA) NBP Public Notice #15 Reply Comments at 7 (agrees with the strong consensus that facilities should be made available to users other than students and teachers after hours).

[27] *See* 47 U.S.C. § 254.

[28] *See* 47 U.S.C. § 254(b).

[29] *See* 47 C.F.R. § 54.500(b); *Schools and Libraries Second Report and* Order, 18 FCC Rcd at 9208, paras. 17-18 (defining "educational purposes" for libraries as activities that are integral, immediate, and proximate to the provision of library services to library patrons).

[30] *See* Bureau of Labor Statistics, Unemployment, at 7 (last viewed Jan. 14, 2010). The unemployment rate was 9.8% as of October 2009. *Id.;* Unemployment Rate, at http://useconomy.about.com/od/economicindicators/p/unemploy_rate.htm (last viewed Feb. 18, 2010). Additionally, for example, in comments submitted by Connected Nation and The National Coalition on Black Civic

paper resumes.[31] Thus, community access to Internet services is critical in facilitating job placement, career advancement, and other uses that help to stimulate economic activity.[32] Therefore, given these special circumstances, it is appropriate to maximize the use of school facilities and services supported by E-rate funding by allowing communities to utilize these facilities and services, consistent with the conditions described below.

11. In order to reduce the likelihood of waste, fraud, and abuse, and to guard against potential additional costs being imposed on the E-rate program, we set forth certain conditions regarding other uses of school facilities for those schools that choose to allow the community to use their E-rate funded services. First, schools participating in the E-rate program are not permitted to request funding for more services than are necessary for educational purposes. Specifically, although under this waiver schools are permitted to allow use of their facilities by the community during non-operating hours, they shall not seek funding for more services than necessary under the E-rate program to serve their current student population. We do not intend for this waiver to allow schools to request additional capacity to allow for additional uses. Any additional use of the services purchased under the E-rate program must be incidental

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Participation-Black Women's Roundtable (Connected Nation and NCBCP-BWR), they report that, in Tennessee and Ohio, children in low-income families, minority families, and single-parents families all report lower-than-average rates of computer ownership and broadband adoption. *See* Connected Nation and NCBCP-BWR NBP Public Notice # 15 Comments at 5-6; *see also* comments filed in response to *A National Broadband Plan for Our Future*, GN Docket Nos. 09-47, 09-51, 09-137, National Broadband Plan Public Notice #16, Comment Sought on Broadband Adoption, DA 09-2403 (rel. Nov. 10, 2009) (NBP Public Notice #16). Specifically, ALA notes that, for families with an income under $25,000, home adoption is about 25 percent; among African-American households, the adoption rate is approximately 45 percent; and among Hispanic households, the adoption rate is approximately 45 percent. ALA NBP Public Notice #16 Comments at 2-3 (citing the Pew Internet & American Life Project, Home Broadband Adoption 2009, at 3-4 (2009), http://www.pewinternet.org/~/media//Files/Reports/2009/Home-Broadband-Adoption-2009.pdf (last viewed Feb. 18, 2010)). Further, Connected Nation (CN)'s research shows that only 47 percent of minorities subscribe to broadband at home compared to 52 percent of non-minority residents. Home broadband adoption among low-income minorities is only 20 percent. In urban areas, where access to broadband facilities is nearly ubiquitous, broadband adoption among minorities is 47 percent compared to 60 percent of non-minorities. In rural areas, 33 percent of minorities subscribe to broadband compared to 40 percent of non-minorities. CN NBP Public Notice #16 Comments at 10-12. Further, the Native Public Media, National Congress of American Indians, Southern California Tribal Chairmen's Association, and New American Foundation, in response to *A National Broadband Plan for Our Future*, GN Docket Nos. 09-47, 09-51, 09-137, National Broadband Plan Public Notice #5, Comment Sought on Broadband Deployment and Adoption on Tribal Lands, DA 09-2093 (rel. Sept. 23, 2009) (NBP Public Notice #5), support community use of existing E-rate facilities and services noting that the E-rate program could be used as the basis to provide funding to Tribal anchor institutions to serve as hubs for community adoption of broadband. *See* Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Loris Ann Taylor, Native Public Media; John Crigler and James E. Dunstan, Garvey Schubert Barer; Jacqueline Johnson Pata and Geoffrey C. Blackwell, National Congress of American Indians; Matthew R. Rantanen, Southern California Tribal Chairmen's Association; and Sascha D. Meinrath and Benjamin Lennett, New America Foundation, Docket Nos. GN Docket Nos. 09-47, 09-51, 09-137 (filed Dec. 24, 2009).

[31] *See* One Economy Corporation National Digital Literacy Initiative NBP Comments at 10 (commenting that those without digital literacy skills will be at a distinct competitive disadvantage in the global marketplace: for instance, 80 percent of all Fortune 500 companies only accept applications online); ALA NBP Public Notice #16 Comments at 5 (stating that libraries are experiencing first-hand the impact of federal and state programs switching to online applications for services, employers requiring resumes sent via email, and more students taking online courses to fit around work schedules); *see also* Doyle, Alison, Online Employment Applications: Online Job Applications vs. Paper Resumes, http://jobsearch.about.com/od/jobapplications/a/onlineapplicat.htm (last viewed Feb. 18, 2010); How to Apply Online and Get an Employer's Attention, http://www.jobweb.org/resumesample.aspx?id=868 (last viewed Feb. 18, 2010).

[32] *See, e.g.*, Dell NBP Public Notice #15 Comments at 3-4.

to the primary purpose of the E-rate funds.[33] Per USAC's deadline for submission of funding year 2010 FCC Form 471 applications, schools should have timely submitted their funding year 2010 requests to USAC by February 11, 2010.[34] Pursuant to the Commission's *Bishop Perry Order*, any subsequent changes to such requests by applicants may only be as a result of an error when submitting their original requests and must be received by USAC within 15 days of the date of the FCC Form 471 Receipt Acknowledgement Letter.[35] Therefore, the Universal Service Administrative Company (USAC) should ensure that any subsequent changes to a request by an applicant are truly errors and that they are not seeking to add additional capacity to their funding requests to meet the needs of their community. Therefore, there should be minimal chance of fraud and abuse by schools attempting to increase their funding requests simply to serve the public in addition to their students. However, if there is any question regarding whether an increase in a funding request is due to a ministerial or clerical error, we direct USAC to request documentation from the school to demonstrate the necessity for the additional services. We believe that this will help to further reduce the likelihood of fraud and abuse by enabling USAC to efficiently assess whether additional requests are truly associated with ministerial and clerical errors or if such requests are seeking services beyond those necessary for educational purposes.

12. Second, any community usage of E-rate funded services at a school facility is limited to non-operating hours, such as after school hours or during times when the students are out of school. Consistent with the Act, services and equipment supported by E-rate funds must, in the first instance, be used for educational purposes and students shall always get first priority in use of the schools' resources.[36] By limiting use by the community to non-operating hours for schools, we comply with the intent of the Act and guard against abuse by eliminating the possibility that community usage may interfere with usage of services as intended by the Act. We emphasize that schools are not required, pursuant to this order, to open up their facilities for community use. We also leave it to schools to establish their own policies regarding specific use of their services and facilities, including, for example, the hours of use.[37]

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[33] *See, e.g.,* WV DOE NBP Public Notice #15 Comments at 10; SECA NBP Public Notice #15 Comments at 15.

[34] *See* USAC Website, Schools and Libraries, FY2010 Application Filing Window Dates Established, at http://www.usac.org/sl/tools/latest-news.aspx#120309 (last viewed Feb. 18, 2010).

[35] *See Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, et al., Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-487170, *et al.*, CC Docket No. 02-6, Order, 21 FCC Rcd 5316, 5326-27, para. 23 (2006) (*Bishop Perry Order*). USAC issues a FCC Form 471 Receipt Acknowledgment Letter (RAL) to both the applicant and service provider upon successful data entry of the FCC Form 471 application and certification. Applicants should review the RAL and submit allowable corrections to USAC. *See* USAC website, Schools and Libraries, Submit Application for Support, http://www.usac.org/sl/applicants/step07/default.aspx (last visited Feb. 18, 2010); USAC website, Schools and Libraries, Form 471 Receipt Acknowledgement Letter, http://www.usac.org/sl/applicants/step07/receipt-acknowledgement-letter.aspx (last viewed Feb. 18, 2010).

[36] 47 U.S.C. § 254 (h)(1)(B).

[37] As required by the Children's Internet Protection Act (CIPA), under current program rules, schools receiving E-rate discounts must certify that they are using "technology protection measures" to block access to inappropriate content by minors. *See* Consolidated Appropriations Act, 2001, Pub. L. No. 106-554 §§ 1701 *et seq.* Section 1721 of CIPA amends section 254(h) of the Act. 47 U.S.C § 254(h); 47 C.F.R. §54.520(c)(1)(i) ("The Internet safety policy adopted and enforced pursuant to 47 U.S.C. 254(h) must include a technology protection measure that protects against Internet access by both adults and minors to visual depictions that are obscene, child pornography, or, with respect to use of computers by minors, harmful to minors."). While supporting community use of E-rate funded facilities and services, AT&T questions whether such filters will continue to be in place for adults using such equipment and who will be responsible for turning the filters off. *See* AT&T NBP Public Notice #15 Comments at 6. As long as the schools are in compliance with the CIPA requirements, we leave these kinds of matters up to the schools to address as part of their policies.

13. Lastly, consistent with the Act, schools' discounted services or network capacity may not be "sold, resold, or transferred by such user in consideration for money or any other thing of value."[38] Specifically, schools cannot charge for the use of services and facilities purchased using E-rate funds.[39] We agree with SECA, however, that while schools cannot sell or transfer the use of any E-rate services, network capacity, or facilities, schools should be able to charge reasonable fees to cover overhead costs for using school services and facilities – such as electricity, security, and heating – necessary to maintain the building during such periods of use.[40] As noted by commenters, charging reasonable fees will help schools minimize any additional overhead costs.[41] Further, organizations using school services and facilities during non-operating hours of the school shall be permitted to charge program participants for their services to recover related costs, such as curriculum development and presentation costs.[42]

14. Therefore, because we find that special circumstances exist and this waiver is in the public interest, we find good cause, on our own motion, to grant a waiver of sections 54.504(b)(2)(v) and 54.504(c)(1)(vii) of our rules, subject to the conditions provided above. This waiver is limited in that it only extends through the end of funding year 2010 and schools that choose to open their services and facilities supported by E-rate funding to the community must adhere to the forgoing conditions. Schools must continue to submit complete and accurate information to USAC in a timely fashion as part of the application review process and must adhere to the E-rate rules and USAC procedures. In addition, we note that the Commission intends to issue a notice of proposed rulemaking this year seeking comment, among other things, on ways to improve the E-rate program and to better maximize the use of broadband connections funded under the E-rate program.

15. Finally, we emphasize that we are committed to guarding against waste, fraud, and abuse and ensuring that funds disbursed through the E-rate program are used for appropriate purposes. Although we grant a waiver of our rules in this order, to the extent the Commission finds that funds were not used properly, the Commission will require USAC to recover such funds through its normal processes. We emphasize that the Commission retains the discretion to evaluate the uses of monies disbursed through the E-rate program and to determine on a case-by-case basis that waste, fraud, or abuse of program funds occurred and that recovery is warranted. The Commission remains committed to ensuring the integrity of the program and will continue to aggressively pursue instances of waste, fraud, or abuse under the Commission's procedures and in cooperation with law enforcement agencies.

IV. NOTICE OF PROPOSED RULEMAKING

16. As indicated above, consistent with the Act, the Commission requires schools and libraries to certify, among other things, that services obtained through discounts from the E-rate program will be used solely for educational purposes.[43] In the *Schools and Libraries Second Report and Order*, the Commission clarified the meaning of educational purposes as "activities that are integral, immediate, and

[38] 47 U.S.C. § 254 (h)(3); *see also* 47 C.F.R. §§ 54.504(b)(2)(v); 54.504(c)(1)(vii).

[39] *See* WV DOE NBP Public Notice #15 Comments at 10; SECA NBP Public Notice #15 Comments at 15.

[40] *See* SECA NBP Public Notice #15 Comments at 14-15.

[41] *See, e.g.,* SECA NBP Public Notice #15 Comments at 14-15; WV DOE NBP Public Notice #15 Comments at 6, 9.

[42] *See* SECA NBP Public Notice #15 Comments at 14-15. For example, if an organization offered a digital literacy course to parents or other members of the community using the Internet access purchased using E-rate funds and charged a nominal fee for the course, such fee would be allowed under this waiver.

[43] *See supra* para. 4; 47 U.S.C. § 254 (h)(1)(B); 47 C.F.R. § 54.504(b)(2)(v); 47 C.F.R. § 54.504(c)(1)(vii).

proximate to the education of students, or in the case of libraries, integral, immediate, and proximate to the provision of library services to library patrons."[44] In November 2009, as part of the Commission's development of a national broadband plan, the Commission sought comment on whether the E-rate program could be modified to allow for the use of broadband facilities at schools by the general community rather than just by students and faculty.[45]

17. In this NPRM, we specifically seek comment on whether we should revise sections 54.504(b)(2)(v) and 54.504(c)(1)(vii) of our rules to allow schools to use underutilized services and equipment funded under the E-rate program for other, secondary purposes, instead of solely for "educational purposes"as is now required under our rules. Specifically, we propose to revise sections 54.504(b)(2)(v) and 54.504(c)(1)(vii) of our rules to require applicants to certify that "[t]he services the applicant purchases at discounts will be used primarily for educational purposes . . . "[46] We tentatively conclude that, if we revise sections 54.504(b)(2)(v) and 54.504(c)(1)(vii) of our rules to allow schools to use underutilized services and equipment funded under the E-rate program for other, secondary purposes, consistent with the Act, E-rate funds must, in the first instance, be used for educational purposes and students shall always get first priority in use of the schools' resources.[47] Any additional use of the services purchased under the E-rate program thus must be incidental to the primary purpose of the E-rate funds.

18. We propose these rule revisions for several reasons. As we noted above in our order granting a waiver of our rules requiring that services and facilities supported by E-rate be used solely for educational purposes through the end of funding year 2010, we believe changing these rules will leverage E-rate funds to serve a larger population at no increased cost to the E-rate program.[48] Currently, services and facilities purchased using E-rate funding remain unused during evenings, weekends, school holidays, and summer breaks. Moreover, many people lack access or have limited access to affordable Internet services for educational and job training opportunities, particularly, for example, in rural, minority, and Tribal communities. Thus, by opening up these facilities to members of the public to use during non-operating hours, we will maximize the use of facilities and services supported by E-rate funding and increase community access to the Internet. Further, we find that these rule changes are consistent with the goals of universal service by making Internet access available to more members of the general public. We also believe these rule changes are consistent with the use of E-rate funding by libraries. Libraries currently provide access to the Internet to members of the general public as part of their mission. Allowing schools to do the same, at their discretion, would simply provide more opportunities for public access to Internet services. Finally, these rule changes would further the Commission's directive from Congress to encourage access to advanced telecommunications and information services.[49] We also invite comment on whether we should modify our definition of educational purposes.[50] Commenters should address whether modification of that definition would accomplish the objectives of maximizing the use of facilities and services supported by E-rate funding and reducing the likelihood of waste, fraud, and abuse.

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[44] *Schools and Libraries Second Report and Order*, 18 FCC Rcd at 9208, paras. 17-18; 47 C.F.R. § 54.500(b).

[45] *See* NBP Public Notice #15 at 6.

[46] *See* 47 C.F.R. §§ 54.504(b)(2)(v), 54.504(c)(1)(vii) as adopted herein; Appendix A.

[47] 47 U.S.C. § 254 (h)(1)(B).

[48] *See supra* paras. 7-10.

[49] *See* 47 U.S.C. § 254(b).

[50] 47 C.F.R. § 54.500(b).

19. In granting the waiver above, in order to reduce the likelihood of waste, fraud, and abuse, and to guard against potential additional costs being imposed on the E-rate program, we set forth certain conditions regarding other uses of school facilities that choose to allow the community to use their E-rate funded services.[51] The conditions are that : (1) schools participating in the E-rate program are not permitted to request funding for more services than are necessary for educational purposes; (2) any community usage of E-rate funded services at a school facility is limited to non-operating hours, such as after school hours or during times in which the school is not open; and (3) consistent with the Act, a school's discounted services or network capacity may not be "sold, resold, or transferred by such user in consideration for money or any other thing of value."[52] If we revise our rules, we tentatively conclude that we would continue to impose these conditions. We seek comment on that conclusion. Furthermore, we seek comment on whether there are any additional conditions to guard against waste, fraud, and abuse that we should impose on schools that allow community use of their E-rate funded services and equipment. For example, should the Commission require additional certifications to ensure that applicants do not request extra capacity to serve the general public? Lastly, we seek comment on any practical or operational implications such a change in our rules would have on schools and the community at large.

V. PROCEDURAL MATTERS

A. Initial Paperwork Reduction Act Analysis

20. This notice of proposed rulemaking does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

B. Initial Regulatory Flexibility Analysis

21. As required by the Regulatory Flexibility Act of 1980, as amended,[53] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) for this notice of proposed rulemaking (NPRM), of the possible significant economic impact on a substantial number of small entities by the rules proposed in this NPRM. The IRFA is found in appendix B. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[54] In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.[55]

C. *Ex Parte* Presentations

22. These matters shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[56] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and

[51] *See supra* paras. 11-13.

[52] *Id.;* 47 U.S.C. § 254 (h)(3).

[53] 5 U.S.C. § 603.

[54] *See* 5 U.S.C. § 603(a).

[55] *Id.*

[56] 47 C.F.R. §§ 1.1200-1.1216.

arguments presented is generally required.[57] Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.[58]

D. Comment Filing Procedures

23. Pursuant to sections 1.415 and 1.419 of the Commission's rules,[59] interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS); (2) the federal government's eRulemaking Portal; or (3) by filing paper copies.[60]

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

    - Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

    - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. The filing hours are from 8:00 a.m. to 7:00 p.m.

    - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

    - U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington, DC 20554.

24. In addition, one copy of each pleading must be sent to each of the following:

    - The Commission's duplicating contractor, Best Copy and Printing, Inc, 445 12th Street, SW, Room CY-B402, Washington, DC 20554; website: www.bcpiweb.com; phone: 1-800-378-3160;

    - Regina Brown, Telecommunications, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street, SW, Room 5-A5360, Washington, DC 20554; e-mail: Regina.Brown@fcc.gov; and

[57] 47 C.F.R. § 1.1206(b)(2).

[58] 47 C.F.R. § 1.1206(b).

[59] 47 C.F.R. §§ 1.415, 1.419.

[60] *See Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-115, Report and Order, 13 FCC Rcd 11322 (1998).

- Charles Tyler, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street, SW, Room 5-A452, Washington, DC 20554; e-mail: Charles.Tyler@fcc.gov.

25. Filings and comments are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, S.W., Room CY-A257, Washington, D.C., 20554. Copies may also be purchased from the Commission's duplicating contractor, BCPI, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554. Customers may contact BCPI through its website: www.bcpiweb.com, by e-mail at fcc@bcpiweb.com, by telephone at (202) 488-5300 or (800) 378-3160 (voice), (202) 488-5562 (TTY), or by facsimile at (202) 488-5563.

26. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.) by e-mail: fcc504@fcc.gov; phone: (202) 418-0530 or (202) 418-0432 (TTY).

27. For further information, contact Regina Brown at (202) 418-7400 in the Telecommunications Access Policy Division, Wireline Competition Bureau.

VI. ORDERING CLAUSES

28. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that sections 54.504(b)(2)(v) and 54.504(c)(1)(vii) of the Commission's rules, 47 C.F.R. §§ 54.504(b)(2)(v) and 54.504(c)(1)(vii) ARE WAIVED to the extent provided herein.

29. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), this order SHALL BE EFFECTIVE upon release.

30. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1 through 4, 201-205, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 through 154, 201 through 205, 254, 303(r), and 403, this notice of proposed rulemaking IS ADOPTED.

31. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this order and notice of proposed rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

APPENDIX A

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 C.F.R. Part 54 as follows:

PART 54 - UNIVERSAL SERVICE

1. The authority citation for Part 54 continues to read as follows:

Authority: 47 U.S.C. §§ 1, 4(i), 201, 205, 214, and 254 unless otherwise noted.

2. Amend § 54.504 by revising (b)(2)(v) and (c)(1)(vii) to read as follows:

§ 54.504 Requests for services.

* * * * *

(b) Posting of FCC Form 470.

* * * * *

(2) * * *

* * * * *

(v) The services the applicant purchases at discounts will be used primarily for educational purposes and will not be sold, resold, or transferred in consideration for money or any other thing of value.

* * * * *

(c) Filing of FCC Form 471.

(1) * * *

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(vii) The services the applicant purchases at discounts will be used primarily for educational purposes and will not be sold, resold, or transferred in consideration for money or any other thing of value.

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APPENDIX B

Initial Regulatory Flexibility Analysis for the *Notice of Proposed Rulemaking*

(1) Need for, and Objectives of, the Proposed Rules

1. In this NPRM, we specifically seek comment on whether we should revise sections 54.504(b)(2)(v) and 54.504(c)(1)(vii) of our rules to allow schools to use underutilized services and equipment funded under the E-rate program for other, secondary purposes, instead of solely for "educational purposes"as is now required under our rules. Specifically, we propose to revise sections 54.504(b)(2)(v) and 54.504(c)(1)(vii) of our rules to require applicants to certify that "[t]he services the applicant purchases at discounts will be used primarily for educational purposes . . . "[61] We also invite comment on whether we should modify our definition of "educational purposes" to accomplish the same objective.[62]

2. We propose these rule revisions for several reasons. As we noted above in our order granting a waiver of our rules requiring that services and facilities supported by E-rate be used solely for educational purposes through the end of funding year 2010, we believe changing these rules will leverage E-rate funds to serve a larger population at no increased cost to the E-rate program.[63] Currently, services and facilities purchased using E-rate funding remain unused during evenings, weekends, school holidays, and summer breaks. Moreover, many people lack access or have limited access to affordable Internet services for educational and job training opportunities, particularly, for example, in rural, minority, and Tribal communities. Thus, by opening up these facilities to members of the public to use during non-operating hours, we will maximize the use of facilities and services supported by E-rate funding and increase community access to the Internet. Further, we find that these rule changes are consistent with the goals of universal service by making Internet access available to more members of the general public. We also believe these rule changes are consistent with the use of E-rate funding by libraries. Libraries currently provide access to the Internet to members of the general public as part of their mission. Allowing schools to do the same, at their discretion, would simply provide more opportunities for public access to Internet services. Finally, these rule changes would further the Commission's directive from Congress to encourage access to advanced telecommunications and information services.[64]

(2) Legal Basis

3. The legal basis for the NPRM is contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3.

(3) Description and Estimate of the Number of Small Entities to Which Rules Will Apply

4. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[65] The RFA generally

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[61] *See* 47 C.F.R. §§ 54.504(b)(2)(v), 54.504(c)(1)(vii) as adopted herein; Appendix A.

[62] 47 C.F.R. § 54.500(b).

[63] *See supra* paras. 6-9.

[64] *See* 47 U.S.C. § 254(b).

[65] 5 U.S.C. § 603(b)(3).

defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[66] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[67] A small business concern is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[68] Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.[69] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[70] Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.[71] A "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[72] Nationwide, as of 2002, there were approximately 1.6 million small organizations.[73] The term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[74] Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.[75] We estimate that, of this total, 84,377 entities were "small governmental jurisdictions."[76] Thus, we estimate that most governmental jurisdictions are small.

5. Small entities potentially affected by the proposals herein include eligible schools and libraries and the eligible service providers offering them discounted services, including telecommunications service providers, Internet Service Providers (ISPs), and vendors of the services and equipment used for internal connections.[77]

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[66] 5 U.S.C. § 601(6).

[67] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[68] Small Business Act, 15 U.S.C. § 632.

[69] *See* SBA, Programs and Services, SBA Pamphlet No. CO-0028, at 40 (July 2002).

[70] 5 U.S.C. § 601(4).

[71] *See* SBA, Office of Advocacy, "Frequently Asked Questions," http://web.sba.gov/faqs/faqindex.cfm?areaID=24 (revised Sept. 2009).

[72] 5 U.S.C. § 601(4).

[73] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[74] 5 U.S.C. § 601(5).

[75] U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, page 272, Table 415.

[76] We assume that the villages, school districts, and special districts are small, and total 48,558. *See* U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

[77] 47 C.F.R. §§ 54.502, 54.503, 54.517(b).

a) Schools

6. As noted, "small entity" includes non-profit and small governmental entities. Under the schools and libraries universal service support mechanism, which provides support for elementary and secondary schools, an elementary school is generally "a non-profit institutional day or residential school that provides elementary education, as determined under state law."[78] A secondary school is generally defined as "a non-profit institutional day or residential school that provides secondary education, as determined under state law," and not offering education beyond grade 12.[79] For-profit schools, and schools and libraries with endowments in excess of $50,000,000, are not eligible to receive discounts under the program.[80] Certain other statutory definitions apply as well.[81] The SBA has also defined for-profit, elementary and secondary schools having $7 million or less in annual receipts as small entities.[82] In funding year 2007, approximately 105,500 schools received funding under the schools and libraries universal service mechanism. Although we are unable to estimate with precision the number of these additional entities that would qualify as small entities under SBA's size standard, we estimate that fewer than 105,500 such schools might be affected annually by our action, under current operation of the program.

b) Telecommunications Service Providers

7. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small incumbent local exchange services. The closest size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[83] According to Commission data, 1,311 incumbent carriers reported that they were engaged in the provision of local exchange services.[84] Of these 1,311 carriers, an estimated 1,024 have 1,500 or fewer employees and 287 have more than 1,500 employees.[85] Thus, under this category and associated small business size standard, we estimate that the majority of entities are small.

8. We have included small incumbent local exchange carriers in this RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[86] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[87] We have therefore included small incumbent carriers in this RFA analysis,

[78] 47 C.F.R. § 54.500(c).

[79] 47 C.F.R. § 54.500(k).

[80] 47 C.F.R. § 54.501.

[81] *See id.*

[82] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 611110.

[83] 13 C.F.R. § 121.201, NAICS code 517110.

[84] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.5, Page 5-5 (August 2008) (*2008 Trends Report*).

[85] *Id.*

[86] 5 U.S.C. § 601(3).

[87] *See* Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC, dated May 27, 1999. The Small Business Act contains a definition of "small business concern," which the RFA

although we emphasize that this RFA action has no effect on the Commission's analyses and determinations in other, non-RFA contexts.

9. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under the SBA rules is for wired telecommunications carriers.[88] This provides that a wired telecommunications carrier is a small entity if it employs no more than 1,500 employees.[89] According to the Commission's *2008 Trends Report*, 300 companies reported that they were engaged in the provision of interexchange services.[90] Of these 300 IXCs, an estimated 268 have 1,500 or few employees and 32 have more than 1,500 employees.[91] Consequently, the Commission estimates that most providers of interexchange services are small businesses.

10. *Competitive Access Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to competitive access services providers (CAPs). The closest applicable definition under the SBA rules is for wired telecommunications carriers.[92] This provides that a wired telecommunications carrier is a small entity if it employs no more than 1,500 employees.[93] According to the *2008 Trends Report*, 1,005 CAPs and competitive local exchange carriers (competitive LECs) reported that they were engaged in the provision of competitive local exchange services.[94] Of these 1,005 CAPs and competitive LECs, an estimated 918 have 1,500 or few employees and 87 have more than 1,500 employees.[95] Consequently, the Commission estimates that most providers of competitive exchange services are small businesses.

11. *Wireless Telecommunications.* Neither the Commission nor the SBA has developed a definition of small entities specifically for wireless telephony. The closest definition is the SBA definition for Wireless Telecommunications Carriers (except Satellite).[96] Under this definition, a cellular licensee is a small entity if it employs no more than 1,500 employees.[97] According to the *2008 Trends Report*, 434 providers classified themselves as providers of wireless telephony, including cellular telecommunications, Personal Communications Service, and Specialized Mobile Radio (SMR) Telephony Carriers.[98] Of these 434 wireless telephony providers, an estimated 222 have 1,500 or fewer employees

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incorporates into its own definition of "small business." *See* U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

[88] 13 C.F.R. § 121.201, NAICS code 517110.

[89] *Id.*

[90] *2008 Trends Report*, Table 5.3, page 5-5.

[91] *Id.*

[92] 13 C.F.R. § 121.201, NAICS code 517110.

[93] *Id.*

[94] *2008 Trends Report*, Table 5.3, page 5-5.

[95] *Id.*

[96] 13 C.F.R. § 121.201, NAICS Code 517210.

[97] *Id.*

[98] *2008 Trends Report*, Table 5.3, page 5-5.

and 212 have more than 1,500 employees.[99] Consequently, the Commission estimates that more than half of the providers of wireless telephony services are small businesses.

12. *Other Wireless Services.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to wireless services other than wireless telephony.[100] The closest applicable definition under the SBA rules is again that of Wireless Telecommunications (except Satellite), under which a service provider is a small entity if it employs no more than 1,500 employees.[101] According to the *2008 Trends Report*, 69 providers classified themselves as wireless data carriers or other mobile service providers.[102] Of these 69 providers, an estimated 65 have 1,500 or few employees and 4 have more than 1,500 employees.[103] Consequently, the Commission estimates that most providers of wireless services other than wireless telephony are small businesses.

13. *Paging and Messaging Service Providers.* In the *Paging Third Report and Order*, we developed a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[104] A "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.[105] Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. In addition, at present, there are approximately 24,000 Private-Paging site-specific licenses and 74,000 Common Carrier Paging licenses. Finally, according to Commission data, 281 carriers reported that they were engaged in the provision of paging services, messaging services, or other mobile services.[106] Of those, the Commission estimates that 279 are small, under the SBA-approved small business size standard.[107]

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[99] *Id.*

[100] The Commission has adopted a number of service-specific definitions of small businesses for various categories of wireless service, principally in the context of the Commission's rules governing spectrum auctions. *See Assessment and Collection of Regulatory Fees for Fiscal Year 2001*, MD Docket No. 01-76, Report and Order, 16 FCC Rcd 13525, Attachment A, paras. 31-54 (2001). For purposes of administering the E-rate program, however, we find that it is appropriate to address the various non-telephony wireless services as a group.

[101] 13 C.F.R. § 121.201, NAICS code 517212.

[102] *2008 Trends Report*, Table 5.3, page 5-5.

[103] *Id.*

[104] *Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, GN Docket No. 93-252, PP Docket No. 93-253, Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068-70 paras. 291-295 (1997), 62 FR 16004 (Apr. 3, 1997), at paras. 291-295.

[105] *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, PR Docket No. 93-253, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, at para. 98 (1999).

[106] *2008 Trends Report*, Table 5.3, page 5-5.

[107] *Id.*

c) Internet Service Providers

14. The 2007 Economic Census places these firms, whose services might include voice over Internet protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider's own telecommunications facilities (*e.g.*, cable and DSL ISPs), or over client-supplied telecommunications connections (*e.g.*, dial-up ISPs). The former are within the category of Wired Telecommunications Carriers,[108] which has an SBA small business size standard of 1,500 or fewer employees.[109] The latter are within the category of All Other Telecommunications,[110] which has a size standard of annual receipts of $25 million or less.[111] The most current Census Bureau data for all such firms, however, are the 2002 data for the previous census category called Internet Service Providers.[112] That category had a small business size standard of $21 million or less in annual receipts, which was revised in late 2005 to $23 million. The 2002 data show that there were 2,529 such firms that operated for the entire year.[113] Of those, 2,437 firms had annual receipts of under $10 million, and an additional 47 firms had receipts of between $10 million and $24, 999,999.[114] Consequently, we estimate that the majority of ISP firms are small entities.

d) Vendors of Internal Connections

15. *Telephone Apparatus Manufacturing*. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in manufacturing wire telephone and data communications equipment. These products may be standalone or board-level components of a larger system. Examples of products made by these establishments are central office switching equipment, cordless telephones (except cellular), PBX equipment, telephones, telephone answering machines, LAN modems, multi-user modems, and other data communications equipment, such as bridges, routers, and gateways."[115] The SBA has developed a small business size standard for Telephone Apparatus Manufacturing, which is: all such firms having 1,000 or fewer employees.[116] According to Census Bureau data for 2002, there were a total of 518 establishments in this category that operated for the entire year.[117] Of this total, 511 had employment of under 1,000, and an additional 7 had employment of 1,000 to 2,499.[118] Thus, under this size standard, the majority of firms can be considered small.

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[108] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[109] 13 C.F.R. § 121.201, NAICS code 517110 (updated for inflation in 2008).

[110] U.S. Census Bureau, 2007 NAICS Definitions, "517919 All Other Telecommunications"; http://www.census.gov/naics/2007/def/ND517919.HTM#N517919.

[111] 13 C.F.R. § 121.201, NAICS code 517919 (updated for inflation in 2008).

[112] U.S. Census Bureau, "2002 NAICS Definitions: 518111 Internet Service Providers"; http://www.census.gov/epcd/naics02/def/NDEF518.HTM.

[113] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 518111 (issued Nov. 2005).

[114] An additional 45 firms had receipts of $25 million or more.

[115] U.S. Census Bureau, 2002 NAICS Definitions, "334210 Telephone Apparatus Manufacturing"; http://www.census.gov/epcd/naics02/def/NDEF334.HTM#N3342.

[116] 13 C.F.R. § 121.201, NAICS code 334210.

[117] U.S. Census Bureau, American FactFinder, 2002 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334210 (released May 26, 2005); http://factfinder.census.gov. The number of

16. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment."[119] The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees.[120] According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year.[121] Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999.[122] Thus, under this size standard, the majority of firms can be considered small.

17. *Other Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in manufacturing communications equipment (except telephone apparatus, and radio and television broadcast, and wireless communications equipment)."[123] The SBA has developed a small business size standard for Other Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees.[124] According to Census Bureau data for 2002, there were a total of 503 establishments in this category that operated for the entire year.[125] Of this total, 493 had employment of under 500, and an additional 7 had

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"establishments" is a less helpful indicator of small business prevalence in this context than would be the number of "firms" or "companies," because the latter take into account the concept of common ownership or control. Any single physical location for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses. In this category, the Census breaks-out data for firms or companies only to give the total number of such entities for 2002, which was 450.

[118] *Id.* An additional 4 establishments had employment of 2,500 or more.

[119] U.S. Census Bureau, 2002 NAICS Definitions, "334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing"; http://www.census.gov/epcd/naics02/def/NDEF334.HTM#N3342.

[120] 13 C.F.R. § 121.201, NAICS code 334220.

[121] U.S. Census Bureau, American FactFinder, 2002 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334220 (released May 26, 2005); http://factfinder.census.gov. The number of "establishments" is a less helpful indicator of small business prevalence in this context than would be the number of "firms" or "companies," because the latter take into account the concept of common ownership or control. Any single physical location for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses. In this category, the Census breaks-out data for firms or companies only to give the total number of such entities for 2002, which was 929.

[122] *Id.* An additional 18 establishments had employment of 1,000 or more.

[123] U.S. Census Bureau, 2002 NAICS Definitions, "334290 Other Communications Equipment Manufacturing"; http://www.census.gov/epcd/naics02/def/NDEF334.HTM#N3342.

[124] 13 C.F.R. § 121.201, NAICS code 334290.

[125] U.S. Census Bureau, American FactFinder, 2002 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334290 (released May 26, 2005); http://factfinder.census.gov. The number of "establishments" is a less helpful indicator of small business prevalence in this context than would be the number of "firms" or "companies," because the latter take into account the concept of common ownership or control. Any single physical location for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the

employment of 500 to 999.[126] Thus, under this size standard, the majority of firms can be considered small.

(4) Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

18. The schools' voluntary offering of Internet resources, as proposed in the NPRM, would not result in additional compliance requirements for small businesses.

(5) Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

19. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance and reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or part thereof, for small entities.[127]

20. In this NPRM, we seek comment on whether we should revise sections 54.504(b)(2)(v) and 54.504(c)(1)(vii) of our rules to allow schools to use underutilized services and equipment funded under the E-rate program for other, secondary purposes, instead of solely for "educational purposes" as is now required under our rules. Specifically, we tentatively conclude that, if we revise sections 54.504(b)(2)(v) and 54.504(c)(1)(vii) of our rules to allow schools to use underutilized services and equipment funded under the E-rate program for other purposes, consistent with the Act, E-rate funds must, in the first instance, be used for educational purposes and students shall always get first priority in use of the schools' resources.[128] Any additional use of the services purchased under the E-rate program must therefore be incidental to the primary purpose of the E-rate funds. Under this proposed rule, applicants will now be able to use their E-rate eligible facilities and services for other, secondary purposes, such as adult education, job training, and digital literacy programs, to benefit the community. We also invite comment on whether we should modify our definition of educational purposes to accomplish the same objective.[129] We thus believe that these rule changes will not have an economic impact on small entities under the E-rate program since we are simply opening school facilities and services, already funded under the E-rate program, for community use during non-operating school hours. In fact, it will benefit participants by giving them the option to maximize the use of their facilities and services supported by E-rate funding. We welcome, however, comments from parties that have opinions different from those reached in this analysis.

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numbers of small businesses. In this category, the Census breaks-out data for firms or companies only to give the total number of such entities for 2002, which was 471.

[126] *Id.* An additional 3 establishments had employment of 1,000 or more.

[127] *See* 5 U.S.C. § 603(c).

[128] 47 U.S.C. § 254 (h)(1)(B).

[129] 47 C.F.R. § 54.500(b).

(6) Federal Rules that may Duplicate, Overlap, or Conflict with the Proposed Rules

21. None.

STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI

Re: *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6

Especially in these times of economic crisis, having broad community access to broadband is essential. We know that broadband availability and adoption are lagging, especially in rural, minority, low-income, and Tribal communities.

Today, we enable schools receiving E-Rate funding to open up their Internet facilities to their communities. Schools will now have the option to permit the general public to use their Internet connections whenever school is not in session. These connections will be available to adults taking evening digital literacy courses, to unemployed workers looking for jobs posted online, to citizens using e-government services, and for other uses that local schools believe will help their communities.

By making broadband available to more members of the public, this waiver furthers the goals of universal service and the Congressional directive to encourage access to advanced telecommunications and information services. And it does so in a way that doesn't increase the size of the Universal Service Fund—indeed, that encourages more efficient use of USF funds.

The idea to adopt this positive reform of E-Rate came out of our broadband process—staff from our Wireline Bureau and broadband team saw a clear and fast opportunity to expand broadband access. We made the decision to move forward, rather than waiting for the Broadband Plan itself.

I thank the Wireline Bureau staff for their hard work on this item, and I look forward to working with my colleagues to make permanent this important and positive change to our E-Rate rules.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6

Of all the programs and initiatives that I've seen at the FCC in almost nine years of service, I believe E-Rate stands out as the best. I wish we could claim authorship of it as our own, but that would, of course, distort its Congressional origins under the wise and visionary leadership of Senators Rockefeller, Snowe, Exon, Kerrey and Hollings, Congressman Markey, Secretary of Education Dick Riley, and many others. Since its inception in the Telecommunications Act of 1996, the E-Rate program has responded to a glaring national need. By connecting schools to the Internet, the E-Rate program plays an absolutely critical role in providing millions of students with the tools necessary for success in the Digital Age. Similarly, by connecting libraries, the E-Rate program helps provide our communities with digital tools necessary to learn, to compete and to prosper. E-Rate has been and continues to be a lifeline for the poorest and hardest-to-reach children and communities that are eager to connect and learn and are at risk of being left behind as technology moves forward.

Despite all its successes, the E-Rate program's job is far from done. While most classrooms have been connected to the Internet—a truly historic accomplishment—some are at the lower end of Internet speed—and some, believe it or not, are still stuck in Dinosaur Dial-up. I don't think any of us wants our kids working and competing on Dinosaur Dial-up while students down the street or in other towns—or countries, for that matter—are enjoying the digital affluence that real broadband can bring to their education and to their preparation for life's tests.

The E-Rate program has been impressively improved along the way, and today the Commission takes another important step forward to realize the lofty goals of its founding fathers and mothers. So I am very pleased to support today's item, which will allow schools to make E-Rate-funded facilities and services available to the general public outside of regular school hours. While the Order allows for this extension of facilities and services to the general public for the next 18-months, I am also pleased that the item includes a Notice of Proposed Rulemaking to consider changing the rules to make this option available on a permanent basis. There is no reason why such facilities and services should go underutilized, provided that schools can support the additional use and funding through E-Rate is used for statutorily-intended purposes.

I see this as the first of many items that this Commission will adopt to further the goal of getting broadband to the four corners of this great nation, and I commend Chairman Genachowski for moving forward with this item now. It is a significant down-payment on the soon-to-be-issued National Broadband Plan. I thank my colleagues for their continuing support of the E-Rate program and also the Bureau for its good work in bringing this item to us today. I look forward to seeing more such items in the near future.

STATEMENT OF
COMMISSIONER ROBERT McDOWELL

Re: *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6

I commend the Chairman and his staff for finding a way to leverage E-Rate funds in a manner that will allow for wider broadband use without requiring additional universal service funds to be expended. This order, aud proposed rules, are modeled after a concept that first emerged in Alaska. In that instance, a waiver of our rules had been granted to allow some remote schools in Alaska to make their networks available to the general public after school hours, on the weekends, during the holidays and throughout summer breaks. It makes sense to open up this opportunity to all communities in our country. Our action will empower schools to allow members of their communities to use the schools' Internet access for purposes such as higher education, job searches and on-line access to government services.

Two principles are key to this proposal's success. First, it is imperative that educational purposes should always get first priority when E-Rate infrastructure is used and, as such, the additional use by the general public should truly be "incidental." The fact that the decision to open up the use of a school's Internet to the general public is left to the sole discretion of the schools will help facilitate this goal. Second, the change in our rules should not inadvertently put an increased demand on the E-Rate program. It should not provide a backdoor way for schools to request more funds than necessary to support their student populations, and any upcoming audits should be designed in a manner to foreclose such actions.

During these challenging economic times, it is more important than ever that our nation find ways to be efficient with our resources, and this proposal will help in that effort. I thank all involved in this matter.

STATEMENT OF COMMISSIONER MIGNON L. CLYBURN

Re: *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6.

The E-rate program has been instrumental in connecting schools throughout the nation to broadband. For students who would otherwise have been shut out of the incredible opportunities high-speed Internet has to offer, E-rate now has them integrated into the digital world and has expanded their educational opportunities at school. Based on this success, we would be remiss if we did not seek additional ways to efficiently expand its reach.

Today's item reflects such thinking. Broadband's ability to improve lives goes far beyond a strictly "educational" context. Computer terminals at public access points that sit dormant waste an important opportunity to help members of the public search for jobs, research health information, or communicate with their friends and families from across the globe. I hope that many schools will use this opportunity to partner with their communities to promote broadband use and adoption for the benefit of their local citizens. Small steps, such as this one, can go a long way towards bridging the adoption gap in the near term as we work to make broadband more accessible to and affordable for all Americans.

I commend the Bureau for identifying this important opportunity. This is the kind of creativity that we must bring to the challenge of ensuring that all Americans are able to have meaningful access to broadband.