

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

Petition of United States Telecom Association	)	
and CTIA–The Wireless Association® for	)	Docket No. 02-6
Declaratory Ruling Clarifying Certain Aspects	)	
of the “Lowest Corresponding Price”	)	
Obligation of the Schools and Libraries	)	
Universal Service Program	)	

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## **I. INTRODUCTION AND EXECUTIVE SUMMARY**

When the Commission implemented the Schools and Libraries Universal Service (“E-Rate”) Program in 1997, the agency adopted rules requiring that eligible institutions participate in the FCC’s competitive bidding process and take service pursuant to that process in order for the institutions to obtain E-Rate discounts. As part of that competitive bidding regime, the Commission adopted the “lowest corresponding price” rule, and related implementing rules, which govern the pre-discount prices that potential providers of E-Rate services can offer eligible institutions in response to an E-Rate-compliant request for bids.<sup>1</sup>

United States Telecom Association (“USTA”) and CTIA —The Wireless Association® have now asked the FCC to issue a declaratory ruling to clarify certain aspects of the lowest corresponding price rule.<sup>2</sup> AT&T wholeheartedly supports the Petition, the relief it seeks, and its proposed construction of the lowest corresponding price rule. In particular, the Commission should clarify that the lowest corresponding price rule applies only to competitive bids submitted in response to a Form 470 and does not impose any continuing obligation on providers — that is, providers need not adjust prices during the term of a contract. The FCC should also clarify that there are no specific procedures that a service provider must use to ensure compliance with the

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<sup>1</sup> See 47 C.F.R. § 54.500(f) (defining “lowest corresponding price”); 47 C.F.R. § 54.504(e) (governing rate disputes relating to the lowest corresponding price obligation); 47 C.F.R. § 54.511(b) (stating that providers of eligible services shall not charge schools or libraries a price above the “lowest corresponding price”).

<sup>2</sup> See *Petition of United States Telecom Association and CTIA–The Wireless Association® for Declaratory Ruling Clarifying Certain Aspects of the “Lowest Corresponding Price” Obligation of the Schools and Libraries Universal Service Program*, Petition for Declaratory Ruling, Docket No. 02-6 (filed March 19, 2010); see also FCC, Public Notice, *Wireline Competition Bureau Seeks Comment on Petition of United States Telecom Association and CTIA–The Wireless Association® for Declaratory Ruling Clarifying Certain Aspects of the “Lowest Corresponding Price” Requirement of the Schools and Libraries Universal Service Program*, DA 10-627 (rel. Apr. 14, 2010) (seeking comment on the Petition).

lowest corresponding price obligation, that the rules are based on prices for a similar *set* of services offered to similarly situated customers, and that the burden-shifting framework that the FCC uses in Section 202(a) cases applies when a school or library alleges that a provider has failed to comply with the lowest corresponding price rule.

AT&T also believes, however, that current competitive circumstances warrant elimination of the lowest corresponding price rule (as well as its implementing rules) altogether. When the FCC adopted the rule more than 13 years ago, it deemed the rule necessary to address certain concerns that were unique to the transitional period following Congress's 1996 amendments to the Communications Act and the FCC's initial launch of the E-Rate program. The FCC determined that the rule was necessary to compensate for the relative lack of competition for E-Rate eligible services that existed at that time and for the fact that schools and libraries lacked experience negotiating for telecommunications offerings in the FCC's new competitive bidding regime. Yet the FCC made clear that it expected competition to emerge in the relevant markets and schools and libraries to gain experience negotiating for eligible services. The FCC also made clear that when these changes occurred, the Commission would amend its rules and rely on a more market-based approach.

After more than a decade of experience with the E-Rate program, schools and libraries are now sophisticated purchasers of E-Rate eligible services. In the aggregate, they have obtained close to \$26 billion in discounts on E-Rate eligible services.

Moreover, these institutions now have access to, and frequently use, sophisticated technology consultants who provide step-by-step guidance on what services they need, the best prices for those services and how to acquire them within budget, and, of course, how to obtain them within the E-Rate program and rules. Numerous official entities, including the FCC,

USAC, and state departments of education and NTIA, also offer schools and libraries many types of assistance and training. Thus, one of the FCC's main reasons for adopting the lowest corresponding price rules — lack of experience — is no longer valid.

Furthermore, the E-Rate marketplace is now robustly and irreversibly competitive. As the Petition notes, the nationwide E-Rate marketplace is characterized by hundreds of competitors providing the widest possible array of services and devices for E-Rate customers. In contrast to the years immediately following the 1996 Act, there are now hundreds of wireline, wireless, satellite-based, and internal connections providers for eligible institutions to choose from. Moreover, there are very low margins for many of the services and products being purchased through the E-Rate program. In short, competitive developments, as the FCC anticipated, have rendered the lowest corresponding price rule unnecessary.

In many respects, the rule is also out of step with the realities of how E-Rate business is conducted. While the lowest corresponding price rules may never have been a great fit with the dynamics of the E-Rate marketplace, the fit has become even less exact in recent years as the E-Rate market has evolved. Therefore, in providing the clarifications sought in the Petition, the Commission must remain mindful of the purposes its rule was designed to achieve and the significant changes that have occurred in the more than 13 years since it was adopted.

## **II. THE LOWEST CORRESPONDING PRICE REQUIREMENT IS UNNECESSARY IN TODAY'S COMPETITIVE ENVIRONMENT**

As discussed in the Petition, the rules concerning the lowest corresponding price obligation have remained largely unchanged since the FCC first adopted them in 1997.<sup>3</sup> However, the state of competition for telecommunications and information services in general and for E-Rate eligible services in particular has changed significantly over the past 13 years. In

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<sup>3</sup> See Petition at 13.

light of these changes, the lowest corresponding price rule is unnecessary and should be eliminated.

When the FCC adopted the lowest corresponding price rule, it deemed it necessary to address competitive concerns and to alleviate perceived negotiating imbalances between providers of eligible services (who, at the time, were primarily incumbent LECs) and their schools and libraries customers (who, at the time, had no experience negotiating prices under the FCC's competitive bidding regime). Indeed, when the FCC adopted the rule, it stated that its purpose in doing so was to compensate for schools' and libraries' "lack of experience in negotiating in" the newly-created E-Rate regime.<sup>4</sup> A year later, the FCC confirmed that one of the rule's central purposes was "to ensure that inexperience does not prevent schools and libraries from receiving competitive prices."<sup>5</sup>

In the immediate wake of the 1996 Act, the FCC also was concerned that the nascent market for competitive offerings would, by itself, be insufficient to discipline providers and prevent them from charging inexperienced schools and libraries rates significantly above cost.<sup>6</sup> At the time, the expectation was that competition "w[ould] arise" and that a more fully developed market—rather than the FCC's lowest corresponding price rules — would ensure that schools and libraries obtain the lowest prices charged to similarly situated customers.<sup>7</sup> But,

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<sup>4</sup> *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9031 (¶ 484) (1997) ("Universal Service Report and Order").

<sup>5</sup> *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 5318, 5398 (¶ 133) (1996) ("Fourth Universal Service Order on Reconsideration") (citing *Universal Service Report and Order*, 12 FCC Rcd at 9031-32).

<sup>6</sup> *See Fourth Universal Service Order on Reconsideration*, 13 FCC Rcd at 5398 (¶ 133); *see also Universal Service Report and Order*, 12 FCC Rcd at 9028 (¶ 479).

<sup>7</sup> *See Federal State Joint Board on Universal Service*, 12 FCC Rcd 87, 362 (¶ 538) (1996) ("Joint Board Recommended Decision") (discussing the hope that a sufficient level of competition "will arise"); *see also Universal Service Report and Order*, 12 FCC Rcd at 9028,

because the Commission found that the markets were insufficiently competitive, the FCC deemed it necessary to adopt the current rule.<sup>8</sup>

Moreover, even in markets where competition was starting to emerge, the FCC determined that the rule was necessary because schools and libraries would not be “informed about all of the choices available to them.”<sup>9</sup> The FCC expressed concern that “[s]chools and libraries may not yet be fully aware of how the 1996 Act is forcing the opening of markets that were previously served by monopolies.”<sup>10</sup> The FCC concluded that it needed to adopt rules because, in the agency’s view, schools and libraries lacked even a basic understanding of the telecommunications markets — stating, for example, that “many schools and libraries may be unaware . . . that wireless service providers may offer the best prices [in some cases]” or even “that cable operators may offer to provide telecommunications service or access to the Internet over their networks.”<sup>11</sup>

In short, the FCC’s decisions make clear that it adopted the lowest corresponding price rule to address a set of concerns that emerged from, and were unique to, the transitional period that existed in the months following Congress’s 1996 amendments to the Communications Act and the initial launch of the E-Rate program. As discussed below, however, these concerns are

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9031 (¶¶ 479, 484) (discussing the lack of sufficient competition at the time the FCC adopted its lowest corresponding price rules and indicating that market-based competition would eliminate the need for the FCC’s lowest corresponding price rules); *see also id.* at 8787 (¶ 19) (“Over time, it will be necessary to adjust the universal service support system to respond to competitive pressures.”).

<sup>8</sup> *See Universal Service Report and Order*, 12 FCC Rcd at 9028 (¶ 479).

<sup>9</sup> *Universal Service Report and Order*, 12 FCC Rcd at 8794 (¶ 30).

<sup>10</sup> *See Universal Service Report and Order*, 12 FCC Rcd at 9028 (¶ 479); *see Joint Board Recommended Decision*, 12 FCC Rcd at 363 ¶ (538) (concluding that “schools and libraries may not yet be aware of the impact of the 1996 Act on opening markets to competition”).

<sup>11</sup> *See Universal Service Report and Order*, 12 FCC Rcd at 9028-29 (¶ 479).

substantially diminished today because of the flourishing, competition for the provision of E-Rate services that has emerged over the past 13 years and because schools and libraries have increased both their sophistication and ability to exercise leverage in negotiations for, and procurement of, eligible services. In light of these changed circumstances, the FCC's lowest corresponding price rule does not fit the realities and dynamics of the E-Rate marketplace today.

**A. The E-Rate Marketplace Is Robustly And Irreversibly Competitive**

At the time the E-Rate rules were promulgated, both the Commission and the Joint Board made clear that competitive developments and the increasing sophistication of the applicant community would eventually alleviate the concerns underlying some of the program's more paternalistic requirements — including the lowest corresponding price rule — and that free market-based techniques should then be leveraged as much as possible in promotion of the program's goals.

Indeed, in its 1997 order adopting the lowest corresponding price rule, the Commission anticipated that the market for E-Rate services would become competitive. The FCC stated that “[w]e anticipate that competition to serve eligible schools and libraries will be vigorous in most markets.”<sup>12</sup>

The FCC also made clear that when the relevant markets became more competitive and schools and libraries gained the necessary experience, the Commission would rely more heavily upon the market and less so upon prescriptive rules. The FCC stated that, “ideally, eligible schools and libraries will take full advantage of the competitive marketplace and the opportunity to aggregate with others to secure cost-based, pre-discount prices for the services they need.”<sup>13</sup> “In competitive markets,” the FCC explained, “we anticipate that schools and libraries will be

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<sup>12</sup> *Universal Service Report and Order*, 12 FCC Rcd at 9028 (¶ 479).

<sup>13</sup> *Universal Service Report and Order*, 12 FCC Rcd at 9028 (¶ 479).

offered competitive, cost-based prices that will match or beat the cost-based prices paid by similarly situated customers for similar services.”<sup>14</sup> Similarly, the FCC emphasized that “in a competitive marketplace, schools and libraries will have both the opportunity and the incentive to secure the lowest price charged to similarly situated non-residential customers for similar services, and providers of telecommunications services, Internet access, and internal connections will face competitive pressures to provide that price.”<sup>15</sup>

The FCC’s conclusions were entirely consistent with the conclusions of the Joint Board, which initially recommended the adoption of the lowest corresponding price rule.<sup>16</sup> As with the Commission, the Joint Board was “hopeful that competition to serve schools and libraries will arise in a large fraction of the market.”<sup>17</sup> Moreover, the Joint Board “expect[ed] that, in a competitive marketplace, schools and libraries would have both the opportunity and the incentive to secure the lowest price charged to similarly situated non-residential customers for similar services.”<sup>18</sup> The Joint Board also “expect[ed] that carriers would face competitive pressures to provide such a price to schools and libraries.”<sup>19</sup> Thus, the Commission, in adopting the lowest corresponding price rule, and the Joint Board, in recommending its adoption, contemplated that marketplace changes and applicants’ experiences under the E-Rate regime would replace the need for the lowest corresponding price requirement.

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<sup>14</sup> *Universal Service Report and Order*, 12 FCC Rcd at 9031 (¶ 484).

<sup>15</sup> *Universal Service Report and Order*, 12 FCC Rcd at 9027 (¶ 475).

<sup>16</sup> *See Joint Board Recommended Decision*, 12 FCC Rcd at 363 (¶ 540) (recommending the adoption of “lowest corresponding price” rules).

<sup>17</sup> *Joint Board Recommended Decision*, 12 FCC Rcd at 362 (¶ 538).

<sup>18</sup> *Joint Board Recommended Decision*, 12 FCC Rcd at 362 (¶ 538).

<sup>19</sup> *Joint Board Recommended Decision*, 12 FCC Rcd at 362 (¶ 536).

Importantly, the FCC’s decision to rely more heavily on marketplace forces in the future was not simply the product of agency preference or policy — it was part of the agency’s congressional mandate. As the Joint Board stated, when Congress amended the Communications Act in 1996 and added the universal service provisions, “Congress sought to create an environment that stimulated competition to enable all customers to benefit from the lower costs and lower prices produced by the competitive pressures of the marketplace.”<sup>20</sup> The FCC agreed, stating that “the most efficient use of the universal service fund support system should be promoted through the use of market-based techniques wherever possible.”<sup>21</sup> In light of the decidedly de-regulatory bent of Congress’ 1996 amendments to the Communications Act and the specific requirements of the new universal service provisions, the Commission made clear that, “[o]ver time, it will be necessary to adjust the universal service support system to respond to competitive pressures.”<sup>22</sup>

Today, as anticipated, the nationwide E-Rate marketplace is characterized by hundreds of competitors providing the widest possible array of telecommunications, internet access, and internal connections services for E-Rate customers,<sup>23</sup> and schools and libraries are “taking full advantage of [that] competitive marketplace.”<sup>24</sup> In fact, USAC reports that overall 3,787 service

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<sup>20</sup> *Joint Board Recommended Decision*, 12 FCC Rcd at 362 (¶ 536).

<sup>21</sup> *Universal Service Report and Order*, 12 FCC Rcd at 9028 (¶ 479) (quotations marks omitted).

<sup>22</sup> *Universal Service Report and Order*, 12 FCC Rcd at 8787 (¶ 19).

<sup>23</sup> *See* Petition at 14-15 (discussing how the E-Rate market has “significantly matured over the past twelve years” and discussing the high numbers of competitors and assortment of eligible services).

<sup>24</sup> *See Universal Service Order*, 12 FCC Rcd at 9028 (¶ 479).

and equipment providers participated in the E-Rate program in 2009.<sup>25</sup> As described below, this environment is very different from the competitive landscape that existed when Congress amended the Communications Act and the FCC began its E-Rate rulemaking proceeding.

For example, today's wireless marketplace includes four national wireless carriers, three large regional providers, and dozens of smaller providers.<sup>26</sup> And there are now five satellite-based providers that offer voice or data service, or both, in the U.S.<sup>27</sup> In fact, the latest Commission statistics show that more than 95 percent of the U.S. population lives in census blocks with at least three competing wireless carriers, and more than half of the population lives in census blocks with at least five competing carriers.<sup>28</sup> Based on publicly available data extracted from the Data Retrieval Tool on USAC's website, there appear to be at least 125 wireless providers actively participating in the E-Rate program.<sup>29</sup> Moreover, the FCC has noted that wireless technology is increasingly being used to provide a range of broadband services,<sup>30</sup> and that prices for wireless offerings have been falling for years and are now among the lowest in the world.<sup>31</sup> It is not surprising, then, that the Commission has found that under each of the established metrics for measuring competition — market structure, provider conduct, consumer

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<sup>25</sup> See 2009 USAC Annual Report, <http://www.usac.org/res/documents/about/pdf/usac-annual-report-2009.pdf>, at 5.

<sup>26</sup> *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 24 FCC Rcd 6185, 6199, 6243 (¶¶ 14, 111) (2009) (“*Thirteenth CMRS Competition Report*”).

<sup>27</sup> *Thirteenth CMRS Competition Report*, 24 FCC Rcd at 6189 (¶ 2).

<sup>28</sup> *Thirteenth CMRS Competition Report*, 24 FCC Rcd at 6189 (¶ 2).

<sup>29</sup> USAC Data Retrieval Tool, <http://www.usac.org/sl/tools/search-tools/data-retrieval-tool.aspx>.

<sup>30</sup> *Thirteenth CMRS Competition Report*, 24 FCC Rcd at 6189 (¶ 1).

<sup>31</sup> *Thirteenth CMRS Competition Report*, 24 FCC Rcd at 6274-77, 6288-89 (¶¶ 189-194, 218-219).

conduct, and market performance — the wireless industry is characterized by “effective competition.”<sup>32</sup>

The increased competition for the provision of wireline offerings only underscores the competitive nature of the market for E-Rate services. Commission data show that there are now 469 CLECs and 800 ILECs providing service in the U.S.<sup>33</sup> This represents a marked increase from the first few years of the E-Rate program when there were only 81 CLECs and 168 ILECS.<sup>34</sup>

Experience also shows that the competitive market for internal connections and customer premises equipment (“CPE”) render the lowest corresponding price rule unnecessary. The Commission completely deregulated the internal connections and CPE marketplace decades ago.<sup>35</sup> In the absence of regulation, consumers still have ready access to these products and they are sold at very low margins, both factors which are inconsistent with the ability to charge prices above competitive levels.<sup>36</sup> It is incomprehensible, then, that the lowest corresponding price rule is still necessary to ensure that E-Rate eligible services are priced competitively.

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<sup>32</sup> *Thirteenth CMRS Competition Report*, 24 FCC Rcd at 6189, 6310 (¶¶ 1, 274).

<sup>33</sup> FCC, Wireline Telecommunications Bureau, Industry Analysis Division, *Local Telephone Competition: Status as of June 30, 2008*, at Tables 3 & 4 (rel. July 2009).

<sup>34</sup> FCC, Wireline Telecommunications Bureau, Industry Analysis Division, *Local Telephone Competition: Status as of June 30, 2008*, at Tables 3 & 4 (rel. July 2009) (providing data for 2008 and 1999).

<sup>35</sup> *See Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980) (“*Computer II*”); *see also Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 16 FCC Rcd 7418, 7422 (¶ 5) (2001) (“*Interstate, Interexchange Marketplace Order*”) (“The Commission . . . deregulated CPE in the *Computer II Order*. It determined that the CPE market was becoming increasingly competitive.”); *see also Universal Service Report and Order*, 12 FCC Rcd at 9016 (¶ 451) (recognizing that “internal connections have been deregulated for some time”).

<sup>36</sup> *See, e.g., Interstate, Interexchange Marketplace Order*, 16 FCC Rcd at 7429 (¶ 21) (“CPE is so widely available that it has been described as a ‘commodity industry’ in that CPE is available from a diversity of vendors and prices have been declining steadily for many types of

As the Commission hoped, applicants today have become “empowered” by the competition that now exists for their business and by their own experiences with the E-Rate program.<sup>37</sup> This empowerment enables applicants to make cost-effective, efficient purchasing decisions and, in so doing, to exercise effectively the “maximum flexibility” bestowed upon them by the Commission’s rules.<sup>38</sup> Thus, the principal concerns underlying the need for the lowest corresponding price rule have been diminished substantially by the marketplace developments that were anticipated when the rule was implemented. Therefore, it is important for the Commission, in providing the clarification now sought, to act in ways that are consistent with, and certainly do not undermine, the very marketplace competition that it sought to foster.

**B. Applicants Are Now Sophisticated Purchasers Of Discounted Services**

As the Petition establishes, E-Rate applicants are now sophisticated purchasers of discounted services.<sup>39</sup> The schools and libraries community has had a dozen years of experience with the E-Rate program and the FCC’s competitive bidding process. During these years, schools and libraries have received in the aggregate, close to \$26 billion in E-Rate discounts on

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CPE.”); *id.* at 7423 (¶ 7) (discussing “the increasing competitiveness of the CPE and enhanced services markets”); *id.* at 7429 (¶ 21) (“It is undisputed in the record that the CPE market is highly competitive”).

<sup>37</sup> *Universal Service Report and Order*, 12 FCC Rcd at (¶¶ 433, 457); *see also Joint Board Recommended Decision*, 12 FCC Rcd at 321 (¶ 458) (“Empowering schools and libraries to choose the services best suited for their needs is critical to achievement of the important universal services goal of pervasive technology deployment and use in all schools and libraries”).

<sup>38</sup> *Universal Service Report and Order*, 12 FCC Rcd at 9029 (¶ 481) (stating that the policy underlying the Commission’s competitive bidding rules is to allow schools and libraries “maximum flexibility” in selecting the offerings that will meet their needs); *see also Joint Board Recommended Decision*, 12 FCC Rcd at 321, 323 (¶¶ 458, 462-63) (recommending that the FCC adopt rules that provide schools and libraries with “maximum flexibility”).

<sup>39</sup> *See* Petition at 14-15.

eligible services.<sup>40</sup> They have also: implemented long-term technology plans; initiated and negotiated through several competitive bidding/purchasing cycles for telecommunications services, Internet access and internal connections services; undergone beneficiary audits; and availed themselves of the many E-Rate program educational opportunities that regularly take place across the country. They have been shown, and learned, the negotiating and purchasing ropes.

Moreover, schools and libraries do not have to go it alone. As the Petition discusses, applicants now have access to, and frequently rely upon, sophisticated technology consultants and web-based resources that provide applicants information on what services they need, the prices and options for those services, and the most efficient strategies for obtaining those services within the E-Rate program and rules.<sup>41</sup> There are also a number of vendors who compete to offer schools and libraries E-Rate support services. In addition, the State E-Rate Coordinators Alliance (“SECA”), along with other organizations, “typically have daily interactions with E-Rate applicants to provide assistance concerning all aspects of the program.”<sup>42</sup>

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<sup>40</sup> See GAO, *Long-Term Strategic Vision Would Help Ensure Targeting of E-rate Funds to Highest-Priority Uses* (March 2009) (“From 1998 — the first funding year of the program — to 2007, USAC made funding commitments of nearly \$22 billion to schools and libraries”); see also Federal-State Joint Board on Universal Service, *Universal Service Monitoring Report*, Docket No. 98-202 (2009); see also FCC, *Connecting America: The National Broadband Plan*, at 236 (rel. March 16, 2010) (“Thousands of schools and libraries have received billions of dollars since the E-rate program began 12 years ago.”).

<sup>41</sup> See Petition at 14-15.

<sup>42</sup> *Schools and Libraries Universal Service Support Mechanisms*, Petition for Clarification and/or Waiver of E-Rate Rules Concerning Technology Plan Creation and Approval Under The Schools and Libraries Universal Service Support Mechanism at 2 n.1, CC Docket No. 02-6 (filed Feb. 21, 2007) (“SECA Petition”).

Applicants have also received numerous rounds of training, information, and tips on the E-Rate program from various federal and state sources, including the FCC and the NTIA, the Universal Service Administrative Company (“USAC”) and state departments of education and local schools and libraries authorities. These entities have published and made available an abundance of fact sheets, step-by-step guides, and other helpful reference materials for the applicant community.<sup>43</sup> For example, in addition to its comprehensive training program<sup>44</sup>, USAC recently expanded its Helping Applicants To Succeed (HATS) outreach program, which was originally created in 2006 and redeveloped in 2009. As part of the HATS program, USAC “conducts outreach to E-rate beneficiaries in order to provide targeted, programmatic education, identify and assist with solving outstanding issues, prevent new issues from occurring, offer assistance to new beneficiaries, and assess USAC’s processes and procedures from a beneficiary’s perspective.”<sup>45</sup> These resources have increased and enhanced applicants’ awareness and sophistication with respect to services, provider and purchasing options, and prices.

At bottom, in the years following the adoption of the lowest corresponding price rule, schools and libraries have gained the experience and knowledge the Commission believed they

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<sup>43</sup> See, e.g., Universal Service Administrative Company, Schools and Libraries, <http://www.usac.org/sl/> (last visited May 1, 2010) (containing detailed training, informational, and other materials to assist schools and libraries in the E-Rate process); FCC, Universal Service For Schools and Libraries, [http://www.fcc.gov/wcb/tapd/universal\\_service/schoolsandlibs.html](http://www.fcc.gov/wcb/tapd/universal_service/schoolsandlibs.html) (last visited May 1, 2010); NTIA, New Universal Service: A User’s Guide, <http://www.ntia.doc.gov/opadhome/uniserve/univweb.htm#schools> (last visited May 1, 2010).

<sup>44</sup> For example, See 2009 USAC Annual Report, <http://www.usac.org/res/documents/about/pdf/usac-annual-report-2009.pdf>, at 12. (In 2009, USAC held 8 one-day training sessions across the country for E-Rate applicants and 2 sessions for service providers, with approximately 1600 attendees with applicant sessions featuring three tracks, one for beginners, one for advanced participants, and one offering specialized sessions on complex topics. In addition, USAC staff created and posted six video tutorials about the E-Rate program, which received over 4,000 views in 2009.

<sup>45</sup> USAC, HATS Overview, <http://www.usac.org/sl/about/hats-outreach/default.aspx> (last visited May 1, 2010).

lacked — and hoped they would gain — when the E-Rate program was launched. It is no longer the case that the applicant community “lack[s] . . . experience in negotiating in . . . competitive telecommunications service market[s],”<sup>46</sup> or that E-Rate customers “may not be fully aware of how the 1996 Act [has forced] the opening of markets that were previously served by monopolies,” “may be unaware” of the availability and benefits of wireless services,<sup>47</sup> or not know “that cable operators may offer to provide telecommunications service or access to the Internet over their networks.”<sup>48</sup>

In sum, increased competition and sophistication of applicants obviates the need for, and weigh against, the LCP rules. These developments certainly demonstrate that the LCP rules, should be eliminated but if they are retained at all they should be narrowed to the limited contexts in which it might be at all relevant, as discussed below.

**III. IN THE EVENT THE LOWEST CORRESPONDING PRICE REQUIREMENTS ARE RETAINED, THE COMMISSION SHOULD ADOPT THE CLARIFICATIONS REQUESTED IN THE PETITION**

If the Commission determines that the lowest corresponding price rule should be retained, AT&T agrees with USTA and CTIA that the Commission should adopt the clarifications sought in the Petition. Granting the Petition would be consistent with the express terms of the lowest corresponding price rule and related rules, the FCC’s orders adopting those rules, and with congressional intent.

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<sup>46</sup> *Universal Service Report and Order*, 12 FCC Rcd at 9031 (¶ 484).

<sup>47</sup> *Universal Service Report and Order*, 12 FCC Rcd at 9028-29 (¶ 479).

<sup>48</sup> *See Universal Service Report and Order*, 12 FCC Rcd at 9028-29 (¶ 479).

**A. The Lowest Corresponding Price Rule Should Only Apply To Competitive Bids Submitted By A Service Provider In Response To A Form 470.**

As the Petition establishes, the lowest corresponding price obligation should only apply to competitive bids prepared and submitted by a provider in response to a Form 470.<sup>49</sup> This reading of the rule is the only one that comports with the plain language, purpose, and structure of the E-Rate rules, the governing statute for the E-Rate program, and the Commission's E-Rate orders.

*First*, as the Petition's discussion of the E-Rate program makes clear, the entire program is based on the requirement that schools and libraries initiate their purchase of E-Rate services via a competitive bid processes triggered by the posting of a Form 470.<sup>50</sup> The E-Rate rules mandate that schools and libraries seeking to participate in the E-Rate program invite competitive bids for service and actually consider each bid before making service selections.<sup>51</sup> Emphasizing the fundamental nature of the competitive bidding requirement, the Commission has stated that "the competitive bidding process is a key component of the schools and libraries program."<sup>52</sup> Echoing this same point, the Commission has stated that "[c]ompetitive bidding for services eligible for discount is a cornerstone of the E-rate program, vital to limiting waste,

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<sup>49</sup> See Petition at 18-25.

<sup>50</sup> See Petition at 18-21.

<sup>51</sup> 47 C.F.R. § 54.504(a) (stating that entities "shall seek competitive bids ... for all services eligible for support"); 47 C.F.R. § 54.511(a) (providing that, "[i]n selecting a provider," eligible entities "shall carefully consider all bids submitted and must select the most cost-effective service offering"); 47 C.F.R. § 54.504(b) (requiring that entities submit Form 470 to initiate bidding); 47 C.F.R. § 54.504(b)(4) (requiring applicants to wait at least four weeks to allow for bids to be submitted). The rules also require applicants to certify under oath that all bids submitted "will be" and "were carefully considered," 47 C.F.R. § 54.504(b)(2)(vii); 47 C.F.R. § 54.504(c)(1)(xi); and further certify that the most cost-effective bid "will be" and "was selected." 47 C.F.R. § 54.504(b)(2)(vii); 47 C.F.R. § 54.504(c)(1)(xi).

<sup>52</sup> *Schools and Libraries Universal Service Support Mechanism*, 19 FCC Rcd 15808, 15815-16 (¶ 21) (2004) ("*Schools and Libraries Fifth Report and Order*"); see also *Fourth Universal Service Order on Reconsideration*, 13 FCC Rcd at 5426 (¶ 185).

ensuring program integrity, and assisting schools and libraries in receiving the best value for their limited funds.”<sup>53</sup>

In fact, apart from contracts that were entered into before the FCC adopted the competitive bidding requirements,<sup>54</sup> the FCC’s rules provide no exception to the requirement that eligible services be taken after consideration of bids submitted in accordance with the agency’s competitive bidding requirements. To be sure, the rules allow schools and libraries to take service from a master contract negotiated by a state telecommunications network, but the FCC’s rules also require that the state network “[c]omply with the competitive bid requirements.”<sup>55</sup>

As relevant, then, E-Rate discounts can only properly be obtained if a school or library complies with the FCC’s competitive bidding requirements and requests bids via the posting of Form 470. In turn, the lowest corresponding price rule should only apply when bids are proactively prepared and submitted in accordance with the E-Rate program’s requirements in response to a Form 470. If Applicants posts a Form 470 and then elects to purchase services through tariffs or other generally available terms — such as retail wireless pricing plans, there is no opportunity, or need, to apply the lowest corresponding price requirement.<sup>56</sup> In any event, it makes little sense to apply the LCP rule in these contexts because the prices are offered, by any

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<sup>53</sup> *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, et al.*, 18 FCC Rcd 26407, 26417 (¶ 22) (2003).

<sup>54</sup> *See Universal Service Report and Order*, 12 FCC Rcd at 9062 (¶ 545) (permitting schools and libraries to apply the relevant E-Rate discounts to contracts that existed before the FCC adopted the competitive bidding regime); *see also* 47 C.F.R. § 54.511(c)(i) (exempting grandfathered contracts from the competitive bidding rules).

<sup>55</sup> 47 C.F.R. § 54.519(a)(6).

<sup>56</sup> *See* 47 C.F.R. § 54.511(b).

provider subject to Title II, pursuant to the general non-discrimination obligation of making services available to similarly situated customers on nondiscriminatory terms.<sup>57</sup>

Second, the Commission's stated purpose for adopting the lowest corresponding price rule further confirms that it should only apply to bids prepared and submitted in response to a Form 470 request for bids. As discussed above, when the Commission adopted the lowest corresponding price requirement in 1997, it did so, in part, because it was concerned that schools' and libraries' "lack of experience in negotiating in" the FCC's competitive bidding regime would inhibit their ability to obtain competitive prices.<sup>58</sup> To address this concern, the Commission created the lowest corresponding price rule and established a "ceiling for [a] carrier's *competitively bid* pre-discount price for interstate rates."<sup>59</sup> Thus, since its inception, the lowest corresponding price rule has been intended to apply only to those services that a provider includes in a bid it prepares and submits in competition with other providers in response to a Form 470 or associated RFP.

Third, when a school or library obtains services via a route other than as part of a contract resulting from a prepared bid submitted by a service provider whether, or not the prices it obtains are LCP compliant cannot be the responsibility of the service provider. Unless they respond to a Form 470 with a prepared bid, service providers may have no idea that the entity calling its business office to purchase service, for example, is a school or library purchasing services with the intention of using E-Rate funds. Applicants, after posting their 470, may not receive any bids from service providers or may opt to not accept any bids, and instead will purchase desired services based on the most cost-effective terms, conditions, and prices providers offer generally

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<sup>57</sup> 47 U.S.C. § 202.

<sup>58</sup> *Universal Service Report and Order*, 12 FCC Rcd at 9031 (¶ 484); *see also supra* Part II.

<sup>59</sup> *Universal Service Report and Order*, 12 FCC Rcd at 8794 (¶ 30) (emphasis added).

to non-residential customers. These publicly available offerings may be part of tariffs, state master contracts, or available through retail wireless stores. In these scenarios, the selected service provider frequently does not know that the customer is an E-Rate customer until after USAC notifies it through a copy of the Receipt Acknowledgement Letter, which does not occur until after a purchase decision has been made and a Form 471 is filed. As the Petition discusses, applying the lowest corresponding price requirement to service providers in this context would raise a host of practical problems.<sup>60</sup>

But more than this, for service providers subject to Title II or those that have national rate plans, the price that the school or library selects under the above mentioned scenarios will automatically meet the standards for LCP since they will be the same prices that any other entity in the same situation would be offered. In these scenarios, the prices offered *are* the lowest corresponding prices as a matter of law.<sup>61</sup> They are the prices approved in tariffs or agreed to in the competitive marketplace for similarly-situated non-residential customers. It makes little practical sense, then, to apply the lowest corresponding price rule to service providers when they do not, or do not have the opportunity, to make a formal bid response to a Form 470.

**B. The Rule Does Not Require Adjustment Of Prices to Comply with The Lowest Corresponding Price During The Term Of A Contract**

AT&T also agrees with the petitioners that a plain reading of the lowest corresponding price requirement does not support a view that the prices, once contractually set, must be

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<sup>60</sup> See Petition at 21-22 (identifying the ways schools and libraries obtain services and how, in this context, application of the lowest corresponding price obligation would deprive providers of timely and fair notice).

<sup>61</sup> See 47 C.F.R. § 54.500(f) (defining “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”).

adjusted to remain in compliance with LCP during the period the contract is in effect.<sup>62</sup> As the Petition discusses,<sup>63</sup> neither the FCC’s definition of “lowest corresponding price”<sup>64</sup> nor the terms of the lowest corresponding price requirement<sup>65</sup> contain any continuing obligation to adjust prices during the term of a contract. Rather, the plain language of these provisions shows that there is a single “lowest corresponding price” for any given provider-customer relationship that applies at the time of contract formation. Reading the rules to require prices to be adjusted during the term of a contract would be flatly inconsistent with the requirements that E-rate supported services must be provided pursuant to a binding contract between applicants and service providers, and that any changes to the terms on which E-rate services are provided must be accompanied by a service substitution request filed with USAC.

Furthermore, a continuing obligation requirement would be an unduly burdensome and cost-prohibitive proposition. Providers would need to continuously monitor each contract and its prices. The costs associated with implementing any such requirement would potentially outweigh the incentives a service provider would have to bid on or otherwise participate in the E-Rate program, and the costs would certainly have the effect of driving up the prices offered by

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<sup>62</sup> See Petition at 25-28.

<sup>63</sup> See Petition at 25-27.

<sup>64</sup> See 47 C.F.R. § 54.500(f) (defining “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”).

<sup>65</sup> 47 C.F.R. § 54.511(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.”).

potential providers, thereby putting further strain on the program and the financial resources of schools and libraries.

**C. There Are No Specific Procedures That A Service Provider Must Use To Ensure Compliance With The Lowest Corresponding Price Obligation**

AT&T also agrees with the petitioners that there are no specific procedures that a service provider must use to analyze or ensure compliance with the lowest corresponding price rule.<sup>66</sup> The plain language of the LCP rule is directed only at a particular outcome—*not* the process a provider uses to produce that outcome. The rule 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.”<sup>67</sup> Moreover, while the FCC’s rules impose document retention requirements on providers of eligible services,<sup>68</sup> these rules do not specify that any particular documents are required to show compliance with any particular rule, including the lowest corresponding price rule.

Moreover, as the Petition highlights,<sup>69</sup> it would not be practical for the FCC to impose a particular compliance process. E-Rate service providers vary by, among other things, size, location, sophistication, market focus, technologies used, regulatory status, and services offered. E-Rate beneficiaries are also different from each other and purchase services in many different ways. In light of these differences, a “one-size-fits-all” compliance process would be unworkable and detract from the FCC’s goal of ensuring that the competitive bidding process

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<sup>66</sup> See Petition at 28-30.

<sup>67</sup> 47 C.F.R. § 54.511(b).

<sup>68</sup> 47 C.F.R. § 54.516(a).

<sup>69</sup> See Petition at 29-30.

leads to the right results: namely, that schools and libraries obtain competitive pricing for eligible services.<sup>70</sup>

**D. Discrete Elements In Service Bundles Do Not Need To Be Compared And Priced When Determining Whether The Service Bundle Complies With The Lowest Corresponding Price Obligation**

AT&T also agrees with the petitioners that the lowest corresponding price rule should be based on prices for a similar *set* of services. In other words, discrete elements in a service bundle do not need to be compared and priced when determining whether the bundle complies with the lowest corresponding price obligation. As an initial matter, the FCC 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*.”<sup>71</sup> And the FCC’s rule governing rate disputes 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.”<sup>72</sup>

Moreover, in the *Universal Service Report and Order*, the Commission expressly “clarif[ied] that a provider of telecommunications services, Internet access, and internal

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<sup>70</sup> For example, any compliance process associated with supra-competitive Priority 2 services must account for the rapid changes in market forces. For example, the three (3) year look back requirement of the LCP rule is especially impractical when labor costs and third party manufactured equipment are components of the price. Priority 2 services frequently require the retention of contractors to perform installation work. Service Providers have no control of market rates for labor, which at a minimum can expect to rise due to cost of living increases. When using internal resources, providers may be limited by the term of labor agreements regarding whether a 3-year look back is feasible with respect to labor rates. Providers may also be limited in their ability to offer pricing at or below earlier prices if the manufacturer prices fluctuate or if there is a manufacturer promotion that lasts longer than 90 days.

<sup>71</sup> 47 C.F.R. § 54.500(f) (emphasis added).

<sup>72</sup> 47 C.F.R. § 54.504(e)(2) (emphasis added).

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*.”<sup>73</sup> Therefore, both the FCC’s rules and its *Universal Service Report and Order* show that the lowest corresponding price only needs to be based on the price for a similar set of services.

**E. The Burden Shifting Framework That Applies In Section 202(a) Cases Should Apply When A Complaint Is Made About A Provider’s Compliance With The Lowest Corresponding Price Obligation**

AT&T agrees that the Commission should clarify that the burden-shifting framework the FCC employs in Section 202(a) cases<sup>74</sup> applies when a school or library alleges that a provider has failed to comply with the lowest corresponding price rules.<sup>75</sup> To start with, the two provisions are similar and serve similar ends. Section 202(a) 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.”<sup>76</sup> Similarly, 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”<sup>77</sup> the “lowest price that a service provider

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<sup>73</sup> *Universal Service Report and Order*, 12 FCC Rcd at 9033 (¶ 488) (emphasis added).

<sup>74</sup> *See* 47 U.S.C. § 202(a). In a Section 202(a) case, “[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.” *RCI Long Distance, Inc. v. New York Tel. Co.*, 11 FCC Rcd 8090, 8106 (¶ 37) (2006). If complainant makes a *prima facie* showing, the burden shifts to the carrier to “show that the discrimination or preference is justified and, therefore, reasonable.” *Id.* at 8107 (¶ 37); *see also* *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990).

<sup>75</sup> *See* Petition at 31-32

<sup>76</sup> 47 U.S.C. § 202(a).

<sup>77</sup> 47 C.F.R. § 54.511(b).

charges to non-residential customers who are similarly situated to a particular school, library, or library consortium for similar services.”<sup>78</sup>

Given the similarities between the two provisions it would be appropriate for the Commission to apply the Section 202(a) approach in the lowest corresponding price context. Moreover, both the telecommunications industry and the Commission have experience operating under the Section 202(a) framework, which provides another basis for applying that approach here. Therefore, the Commission should clarify that any Applicant alleging that a service provider’s price fails to comply with the lowest corresponding price rule must make a *prima facie* showing that the service provider gave a lower price to a similarly situated entity for similar services within the relevant time period. If this showing is made, the burden would then shift to the service provider to explain why the rate offered is the lowest corresponding price or is otherwise justified.

#### **IV. CONCLUSION**

For the foregoing reasons, the Commission should eliminate the lowest corresponding price and related rules. They are no longer necessary in today’s competitive environment and do not fit the realities and dynamics of today’s E-Rate market. However, if the FCC determines that the rules are necessary, the Commission should provide the relief requested in the Petition.

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<sup>78</sup> 47 C.F.R. § 54.500(f).

Respectfully submitted,

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