

for using telecommunications and information technology to improve education or library services.¹⁵⁶ To ensure that the technology plan is based on the reasonable needs and resources of the applicant and is consistent with the goals of the E-rate program, the Commission requires technology plans to be approved by either the applicant's state or another USAC-certified technology plan approver.¹⁵⁷ An applicant whose technology plan has not been approved when it files the FCC Form 470 must certify that it understands that its technology plan must be approved prior to the commencement of service.¹⁵⁸

54. Next, the Commission's competitive bidding rules require an eligible school, library, or consortium that includes eligible schools and libraries to seek competitive bids for all services eligible for support.¹⁵⁹ The applicant must submit to USAC a completed FCC Form 470 setting forth, among other things, the services for which it seeks discounts. The applicant must describe the desired services with sufficient specificity to enable potential service providers to submit bids. The applicant provides this description on its FCC Form 470 or indicates on the form that it has a Request for Proposal (RFP) available providing detail about the requested services.¹⁶⁰ The FCC Form 470 is then posted to USAC's website for all potential competing service providers to review.¹⁶¹

55. After submitting an FCC Form 470, the applicant must wait at least 28 days before making a commitment with its selected service providers.¹⁶² The applicant must consider all submitted bids prior to entering into a contract and price must be the primary factor in selecting the most cost-effective proposal.¹⁶³ The Commission's competitive bidding requirements apply in addition to state and local competitive bidding requirements, and are not intended to preempt such state and local requirements.¹⁶⁴ Pursuant to section 54.504(c) of the Commission's rules, an applicant requesting support

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Nos. 96-45, 97-21, Order, 16 FCC Rcd 18812, at para. 11 (2001). Basic telecommunications services include digital transmission services, paging services, telephone service, telephone service components, and other eligible telecommunications services. See Funding Year 2010 ESL.

¹⁵⁶ 47 C.F.R. § 54.508(a).

¹⁵⁷ 47 C.F.R. § 54.508(d); *Universal Service First Report and Order*, 12 FCC at 9077-78, para. 574; see also USAC website, Schools and Libraries, Technology Plans, available at <http://www.universalservice.org/sl/applicants/step02/> (last visited Sept. 14, 2010).

¹⁵⁸ 47 C.F.R. §§ 54.504(b)(2)(iii)-(iv), 54.508(c); see also *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15830, para. 56 (2004) (*Schools and Libraries Fifth Report and Order*). An applicant whose technology plan has not been approved when it files the FCC Form 471 must, once again, certify that it understands its technology plans must be approved prior to the commencement of service. 47 C.F.R. § 54.504(c)(1)(iv)-(v). Additionally, in order to comply with the requirements of the Protecting Children in the 21st Century Act, to be eligible for E-rate discounts for Internet access and internal connection services, schools and libraries that have computers with Internet access must certify that they have in place certain Internet safety policies and technology protection measures. See *Protecting Children in the 21st Century Act*, Pub. L. No. 110-385, Title II, 122 Stat. 4096 (2008).

¹⁵⁹ 47 C.F.R. §§ 54.504, 54.511(c).

¹⁶⁰ See *Schools and Libraries Universal Service, Description of Services Requested and Certification Form*, OMB 3060-0806 (May 2003) (FCC Form 470), available at <http://www.usac.org/res/documents/sl/pdf/470.pdf> (last visited Sept. 14, 2010). The RFP must be available to all potential bidders for the duration of the bidding process. *Id.*

¹⁶¹ 47 C.F.R. § 54.504(b)(3).

¹⁶² 47 C.F.R. § 54.504(b)(4).

¹⁶³ 47 C.F.R. § 54.511(a); see *Request for Review by Ysleta Independent School District, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26407 (2003) (*Ysleta Order*).

¹⁶⁴ 47 C.F.R. § 54.504(a).

for eligible products and services must sign a contract for eligible services prior to filing its FCC Form 471.¹⁶⁵ An applicant also must certify on the FCC Form 471 that it has entered into a service contract that complies with state and local contract laws.¹⁶⁶ Tariffed services and certain month-to-month services do not require a signed contract.¹⁶⁷

56. After entering into a contract for eligible services, the applicant files an FCC Form 471 to request funding. The form specifies the services that have been ordered, the service providers the applicant has selected to provide services, the eligible discount rate, and an estimate of funds needed to cover the discounts to be given for eligible services.¹⁶⁸ The filing window for the FCC Form 471 is established by USAC each year and typically closes in early February preceding the start of the funding year.¹⁶⁹ An applicant must file a new FCC Form 471 each year.¹⁷⁰ A new FCC Form 470 is not required to be posted each funding year if the applicant is seeking discounts on services provided under a multi-year contract executed under an FCC Form 470 posted in a prior funding year.¹⁷¹ USAC assigns a funding request number (FRN) to each request for discounted services and issues funding commitment decision letters (FCDLs) approving or denying the requests for discounted services.

57. After USAC reviews the application, it informs the applicant whether funding has been granted, and if so, the amount that has been approved. Once the applicant informs USAC that it is receiving services, USAC accepts invoices from service providers and begins to disburse funds.

2. Technology Plans

58. We amend sections 54.504 and 54.508 of our rules to eliminate the E-rate technology plan requirements for all priority one applications.¹⁷² We retain, however, the technology plan requirements for applicants requesting priority two funding.

¹⁶⁵ 47 C.F.R. § 54.504(c).

¹⁶⁶ 47 C.F.R. § 54.504(c)(1)(vi).

¹⁶⁷ See Instructions for Completing the Schools and Libraries Universal Service Services Ordered and Certifications Form (FCC Form 471) at 23, available at http://www.usac.org/res/documents/sl/pdf/471i_fy05.pdf (last visited Sept. 14, 2010) (FCC Form 471 Instructions).

¹⁶⁸ See Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2004) (FCC Form 471), available at http://www.usac.org/res/documents/sl/pdf/471_FY05.pdf (last visited Sept. 14, 2010); see also 47 C.F.R. § 54.504(c).

¹⁶⁹ 47 C.F.R. § 54.507(c); see also USAC website, Schools and Libraries Deadlines, available at <http://www.usac.org/sl/tools/deadlines/default.aspx> (last visited Sept. 14, 2010) (USAC Schools and Libraries Deadlines website). For example, for the funding year that began July 1, 2010, the filing window ran from Dec. 3, 2009 to Feb. 19, 2010.

¹⁷⁰ 47 C.F.R. § 54.507(d).

¹⁷¹ See USAC website, Schools and Libraries, Contract Guidance, available at <http://www.universalservice.org/sl/applicants/step04/contract-guidance.aspx> (last visited Sept. 14, 2010) (USAC Contract Guidance website); see also Instructions for Completing the Schools and Libraries Universal Service Description of Services Requested and Certification Form (FCC Form 470), OMB 3060-0806 (October 2004) (FCC Form 470 Instructions) at 3-4, available at <http://www.usac.org/res/documents/sl/pdf/470i.pdf> (last visited Sept. 14, 2010).

¹⁷² See Appendix A, 47 C.F.R. §§ 54.503(c)(2)(iii), 54.504(a)(1)(iv)-(v), and 54.508 as amended herein. We note that the revised rules amend the current rule sections 54.504 and 54.508. As explained below, in this order we consolidate the competitive bidding rules into amended section 54.503 and the rules pertaining to eligible services into amended section 54.502. See *infra* nn.242 and 325.

59. To avoid duplication of technology plan requirements and to simplify the application process in general, we proposed in the NPRM to eliminate E-rate technology plan requirements for applicants seeking priority one services that are otherwise subject to state and local technology planning requirements.¹⁷³ Commenters indicated, however, that determining which applicants seeking priority one services are subject to technology plan requirements outside of the E-rate program could be difficult, might lead to unnecessary violations of program rules, and could be administratively difficult to administer.¹⁷⁴ Because the record demonstrates that applicants are required to or will likely perform technology planning even without the E-rate program requirements, we find that eliminating the technology planning requirement entirely for priority one funding will better serve the intent of the NPRM proposal to simplify the application process, while still adequately addressing concerns regarding waste, fraud, and abuse.¹⁷⁵

60. *Priority One.* The Commission must strive to balance the need to ensure that E-rate funds are being used for their intended purposes with avoiding the imposition of unnecessarily burdensome requirements on applicants. Moreover, the Commission must routinely reevaluate its program rules to ensure that it has struck the proper balance. After careful consideration of our experience and comments in the record, we conclude that the proper balance warrants eliminating the Commission's technology plan requirements for applicants requesting priority one services.¹⁷⁶

61. We find that it is reasonable to eliminate the technology plan requirement for all priority one service requests, even when the applicant is not subject to a state or local technology planning requirement, and regardless of the amount of the request.¹⁷⁷ Even without a Commission requirement, most entities will continue to evaluate their needs by conducting technology planning.¹⁷⁸ Applicants applying for Enhancing Education Through Technology (EETT) funding from the Department of Education must comply with a technology plan requirement nearly identical to the Commission's.¹⁷⁹ The Elementary and Secondary Education Act, reauthorized in 2002 as the No Child Left Behind Act, also has

¹⁷³ *E-rate Broadband NPRM*, 25 FCC Rcd at 6879, para. 18.

¹⁷⁴ See ALA Comments at 6; EMPA Comments at 2.

¹⁷⁵ AASA & AESA Comments at 2; ALA Comments at 5; Conterra Comments at 2; CGCS Comments at 3; CGCS Reply Comments at 4; NC DPI Comments at 2; National Hispanic Media Coalition (NHMC) Comments at 9; R&E Network Community Comments at 8; Richmond Public Library Comments at 1-2; SECA Comments at 5-9; SD DOE Reply Comments at 1-2; UEN Comments at 2; WDPI Comments at 2.

¹⁷⁶ AASA & AESA Comments at 2; ALA Comments at 5; Blackboard Comments at 19-20; Conterra Comments at 2; CGCS Comments at 3; CGCS Reply Comments at 4; NC DPI Comments at 2; NHMC Comments at 9; R&E Network Community Comments at 8; Richmond Public Library Comments at 1-2; SECA Comments at 5-9; SD DOE Reply Comments at 1-2; UEN Comments at 2; WDPI Comments at 2.

¹⁷⁷ We also decline, at this time, to adopt other recommendations modifying the technology plan requirement for priority one services. See CDE Comments at 4 (recommending a shorter technology plan process); CSM Comments at 4-5 (proposing a simplified technology planning process); EPS Comments at 13 (proposing changes to more accurately reflect current educational technology planning); ESPA Comments at 2 (creating a priority one technology plan exemption for basic telephone connectivity and Internet access up to a certain speed); NHMC Comments at 9 (proposing a simplified technology planning process).

¹⁷⁸ See ALA Comments at 6; CGCS Reply Comments at 4; NYSED Comments at 2; SECA Comments at 6-7; R&E Network Community Comments at 7-8; UEN Comments at 2.

¹⁷⁹ See *Schools and Libraries Fifth Report and Order*, 19 FCC Rcd at 15828-29, paras. 59-60; 47 C.F.R. § 54.508(b); CDE Comments at 3; NYSED Comments at 2; SECA Comments at 6, 8. We note that one commenter states that the future of the EETT program is unclear. See CDE Comments at 4.

requirements that overlap with E-Rate's technology planning rules.¹⁸⁰ In addition, technology planning is often incorporated into the budget and procurement processes of schools and libraries.¹⁸¹ Thus, we find that applicants generally will continue to perform technology analyses notwithstanding elimination of the technology plan requirement for E-rate.¹⁸²

62. Furthermore, we find that this change will simplify the current application process and will reduce the costs for applicants of complying with and administering the E-rate program.¹⁸³ Reducing the burden on applicants will result in greater E-rate participation, particularly for the schools with the fewest resources and greatest need to participate in the program. Eliminating the technology plan requirement for priority one applications also will reduce costs associated with administering the E-rate program.¹⁸⁴

63. Moreover, the Commission has other safeguards to ensure that priority one funding requests are based "on the reasonable needs and resources of the applicant and are consistent with the goals of the program."¹⁸⁵ For instance, to ensure that applicants are able to use the discounted services effectively, and thereby minimize waste, our rules require applicants to certify that they have "secured access to all of the resources, including computers, training, software, maintenance, internal connections, and electrical connections, necessary to make effective use of the services."¹⁸⁶ The Commission has additional protections in place to guard against waste, fraud, and abuse in the E-rate program.¹⁸⁷ Although we find that we no longer need the technology plan requirement for priority one services in light of the other protections in place, we will remain vigilant to ensure that eliminating this requirement does not increase opportunities for waste, fraud, and abuse.

64. *Priority Two.* We conclude that we should retain the requirement to have a technology plan for priority two services.¹⁸⁸ We find that maintaining a specific technology plan requirement for E-rate applicants for priority two services – internal connections and basic maintenance of internal connections – continues to serve a valuable purpose and therefore outweighs any potential administrative burden.¹⁸⁹ Many commenters support this conclusion.¹⁹⁰ First, our experience reflects that waste, fraud,

¹⁸⁰ SD DOE Comments at 2. See 20 U.S.C. § 6764 (noting that schools eligible to receive a state or local subgrant must submit to the state educational agency "an application containing a new or updated local long-range strategic educational technology plan").

¹⁸¹ WVDE Comments at 1.

¹⁸² See, e.g., SECA Comments at 8-9.

¹⁸³ Many commenters support this conclusion. See, e.g., AASA & AESA Comments at 2; ALA Comments at 5; CGCS Reply Comments at 4; NC DPI Comments at 2; NHMC Comments at 9; R&E Network Community Comments at 7-8; Richmond Public Library Comments at 1-2; SECA Comments at 5-9; SD DOE Reply Comments at 1-2; UEN Comments at 2; WDPI Comments at 2.

¹⁸⁴ For example, our rules except "basic telephone services" from the technology plan requirement. Our decision here will eliminate the need to determine whether a requested service falls within the exception for basic telephone services.

¹⁸⁵ ALA Comments at 6; SECA Comments at 6; *Universal Service First Report and Order*, 12 FCC Rcd at 9078, para. 574.

¹⁸⁶ 47 C.F.R. § 54.504 (b)(2)(vi), (c)(1)(iii).

¹⁸⁷ For instance, in the *Schools and Libraries Fifth Report and Order*, the Commission adopted several measures, including audit guidelines, document retention policies, and beneficiary certification requirements to guard against waste, fraud, abuse. See *Schools and Libraries Fifth Report and Order*, 19 FCC Rcd at 15809, para. 1.

¹⁸⁸ See ESPA Comments at 3; NY DOE Comments at 2; Sunesys Comments at 5.

¹⁸⁹ *E-rate Broadband NPRM*, 25 FCC Rcd at 6880, para. 20.

and abuse tends to be concentrated in use of priority two services. Past experience convinces us that we should not at this time eliminate the technology plan requirement for priority two services. Second, installing internal connections in schools and libraries is a complex and expensive process, with installation techniques that vary depending on the nature of the project.¹⁹¹ Unlike priority one services, which are generally recurring services, internal connections are one-time upgrades that are designed to produce long-term benefits to schools and libraries. Maintaining the requirement for priority two services will require applicants to plan and justify these requests and strategically define their vision for use of these technologies.¹⁹²

65. For the reasons stated above, we decline to adopt proposals suggested by commenters either (1) to completely eliminate the technology plan requirement for priority two applicants;¹⁹³ or (2) to establish a bifurcated approach in which only priority two applicants not subject to other state or local requirements are required to develop technology plans.¹⁹⁴ It would be administratively burdensome for USAC to determine which schools and libraries are subject to official state and local technology plan requirements and which are not.¹⁹⁵

66. While we decline to eliminate the technology plan for priority two applicants, we adopt measures to simplify the technology planning process. First, we amend section 54.504 of our rules to eliminate the requirement that technology plans covering the entire, upcoming funding year be in place when the FCC Form 470 is submitted.¹⁹⁶ Under the current rule, an applicant may not rely on an approved, existing technology plan if it expires prior to the last date of service of the upcoming funding year.¹⁹⁷ We believe that the three-year technology plan cycle that has evolved for the E-rate program does not accurately reflect how schools and libraries plan for their technology needs.¹⁹⁸ For example, if a school has developed and is implementing a three-year technology plan, it does not make sense to require the school to develop a new plan in October (before filing its Form 470) just because the existing plan expires before the upcoming funding year ends. The school should be able to obtain services under that existing technology plan if it covers part of the upcoming funding year and then revise the plan over the next several months before it expires. Forcing the applicant to prepare another three-year plan so far in advance of the end of the current one is administratively burdensome. Technology plans are evolving documents, and we want to encourage applicants to have technology plans that reflect their current needs.

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¹⁹⁰ See, e.g., CDE Comments at 4; EMPA Comments at 5; Sentinel Comments at 3; ESPA Comments at 3; NY DOE; NYSED Comments at 2; Sunesys Comments at 5.

¹⁹¹ See Sentinel Comments at 3.

¹⁹² NY DOE Comments at 2.

¹⁹³ ALA Comments at 5-6; Conterra Comments at 2-3; CGCS Reply Comments at 4 (agreeing with commenters wanting complete elimination); EMPA Comments at 2-3 (arguing for complete elimination for all applicants or no change at all); NC DPI Comments at 2; R&E Network Community Comments at 7-8; Richmond Public Library Comments at 1-2; SECA Comments at 5-9; State of Alaska Comments at 2-3 (add certification to 471 instead); WDPI Comments at 2.

¹⁹⁴ CGCS Comments at 3; NY DOE Comments at 2.

¹⁹⁵ See ALA Comments at 6; EMPA Comments at 2.

¹⁹⁶ See Appendix A, 47 C.F.R. § 54.504, as amended herein; Chicago Public Schools (CPS) Comments at 2; EMPA Comments at 4; NYSED Comments at 3; SETDA Comments at 3; see also *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*, CC Docket No. 02-6, WC Docket No. 05-195 (filed May 10, 2007) (SECA Petition).

¹⁹⁷ See, e.g., FCC Form 470, Block 5, Item 20. Thus, for example, if a technology plan expires in May 2011, it could not serve as the technology plan for the funding year that runs from July 1, 2010 to June 30, 2011.

¹⁹⁸ See EMPA Comments at 4; NYSED Comments at 3; SECA Petition at 4.

We thus find that applicants with approved technology plans that cover at least part of the upcoming funding year in effect as of the date of their FCC Form 470 filings will be deemed to be in compliance with our rules.

67. We also find that applicants are not required to have a technology plan in place before a third-party master contract's FCC Form 470 is posted. FCC Forms 470 for master contracts typically are filed far in advance of the filing window because of the more detailed solicitation process they require. Schools and libraries typically have no control or advance knowledge of the solicitation of bids for third-party master contracts, and, as such, would have no way of knowing when their technology plans would need to be completed.¹⁹⁹ Therefore, we find that, if an applicant has filed its own FCC Form 470, but later chooses to purchase a service from a state master contract, the applicant only needs to have a technology plan in existence prior to filing its own FCC Form 470. To do otherwise could unintentionally discourage applicants from taking service from a master contract.

68. We also amend section 54.508 of our rules to eliminate the requirement that applicants demonstrate they have a budget sufficient to acquire and support the non-discounted elements of the plan.²⁰⁰ The E-rate program already has rules in place to ensure that applicants have sufficient resources, and thus this requirement is redundant.²⁰¹

69. *E-Rate Central Petition.* E-rate Central filed a petition seeking clarification of the language defining "basic telephone services" for priority one services in the funding year 2008 ESL.²⁰² The actions in this order address E-Rate Central's concerns. Therefore, we find that no further Commission action on E-Rate Central's petition is necessary.

3. Competitive Bidding Process

70. *FCC Form 470.* We retain the competitive bidding and waiting period obligations for all service requests, even where applicants are subject to state or local procurement obligations, rather than subjecting priority one and priority two applications to different standards, as proposed in the *NPRM*. We find, however, that we should simplify the FCC Form 470 process for all program participants.²⁰³ Many applicants requested that we simplify the FCC Form 470 if we do not eliminate it.²⁰⁴ After consideration of the record and our programmatic experience, we conclude that the competitive bidding and waiting period requirements have provided consistency and transparency for program participants in their search for the most cost-effective provider of E-rate eligible services. In seeking to achieve the proper balance between ensuring program integrity and eliminating excessive administrative burdens, we conclude that

¹⁹⁹ Applicants may purchase eligible services from "master contracts" negotiated by a third party such as a governmental entity. See 47 C.F.R. § 54.500(g) (defining "master contract" as a contract negotiated with a service provider by a third party, the terms and conditions of which are then made available to an eligible school, library, rural health care provider, or consortium that purchases directly from the service provider).

²⁰⁰ See Appendix A, 47 C.F.R. § 54.508 as amended herein.

²⁰¹ See 47 C.F.R. § 54.504 (b)(2)(vi), (c)(1)(iii); *Schools and Libraries Fifth Report and Order*, 19 FCC Rcd at 15831, para. 66. We also amend §§ 54.503(b)(2)(iii) and 54.504(a)(1)(iv) by condensing subsections (A) and (B) and removing the "higher-level" technology plans language to be consistent with the proposed changes simplifying FCC Forms 470 and 471. See *infra* para. 72; Appendix A, 47 C.F.R. §§ 54.503, 54.504 as amended herein.

²⁰² Petition for Clarification of E-Rate Central, CC Docket No. 02-6 (filed Oct. 31, 2007).

²⁰³ See *E-rate Broadband NPRM*, 25 FCC Rcd at 6880-83, paras. 21-23; see also *Wireline Competition Bureau Seeks Comment on Revisions to FCC Forms 470 and 471 under the Paperwork Reduction Act*, Public Notice, DA 10-1248 (July 1, 2010).

²⁰⁴ See, e.g., AT&T Comments at 3; AT&T Reply Comments at 2-3; CDE Comments at 5-6; CDE Reply Comments at 2; Sprint Comments at 8-9; SECA Comments at 9-19; Montgomery County Public Schools Reply Comments at 2; SETDA Reply Comments at 2.

the preferable course is to simplify and redesign the FCC Form 470. We find that the changes we adopt will decrease the number of denials that stem purely from technical deficiencies rather than the applicant's failure to conduct a fair and open competitive bidding process.²⁰⁵ Streamlining the form to include only the information necessary to the competitive bidding process will also reduce appeals and increase program participation. Accordingly, we amend section 54.504(b) of the Commission's rules to reflect accurately the specific information being requested on the FCC Form 470 in order to facilitate a fair and open competitive bidding process.²⁰⁶

71. We find that requiring the FCC Form 470 produces a better competitive bidding process.²⁰⁷ Currently, schools and libraries are required to post an FCC Form 470 to USAC's website so that service providers easily can view the services that are requested in one centralized location.²⁰⁸ While many schools and libraries must also follow their own state or local procurement processes, those bid requests are often limited to publication, for example, in local newspapers. The nationwide posting on USAC's website ensures that more service providers can obtain notice about the requests for bids. If more service providers are viewing and responding to proposals, the resulting additional competition should help keep prices lower for applicants and, in turn, require fewer dollars from the universal service fund.²⁰⁹ Many service providers noted that they annually review the posted FCC Forms 470 and submit bids to provide the requested services.²¹⁰

72. We anticipate that the new, simplified FCC Form 470 will take effect prior to the opening of the filing window for funding year 2011. However, if an applicant has already submitted an FCC Form 470 (in the current format) for funding year 2011, the applicant will not be required to submit a new form.²¹¹ Once the revised form has received Office of Management and Budget (OMB) approval, all

²⁰⁵ As the Commission and commenters have observed, the portions of the FCC Form 470 related to category selections and multiyear contracts, among others, have been the basis for a multitude of funding request denials by USAC because of technical errors rather than defects that negatively affected the competitive bidding process. See *E-rate Broadband NPRM*, 25 FCC Rcd at 6881-82, para. 22; see also Sprint Comments at 9; CDE Reply Comments at 2; Qualcomm Reply Comments at 9.

²⁰⁶ See Appendix A, 47 C.F.R. § 54.503(c) as amended herein. In this order, we consolidate all of the rules pertaining to competitive bidding in section 54.503. Most of the competitive bidding provisions were previously codified in section 54.504. In section 54.504(b)(i)-(vi), schools, libraries, or consortia including those entities, were directed to supply on their FCC Forms 470 information related to computer equipment. As these subsections are no longer necessary, we delete them from the rules and replace them with new language directing schools, libraries, and consortia including those entities, to provide on their FCC Forms 470 a list of specified services for which they are likely to seek discounts and sufficient information to enable bidders to reasonably determine the needs of the applicant. See Appendix A, 47 C.F.R. § 54.503(c)(1)(i) and (ii) as amended herein.

²⁰⁷ See, e.g., NYSED Comments at 3-4; CDE Comments at 5-6; Verizon Comments at 14; Sunesys Comments at 5-6; Qwest Comments at 3-4; UEN Comments at 4; Kellogg & Sovereign Comments at 7-9; Nevesem Reply Comments at 8; Montgomery County Public School Reply Comments at 2; Norlight Telecom Reply Comments at 2.

²⁰⁸ See USAC website, Schools and Libraries, Description of Services Requested and Certification Form (Form 470) Search Posted, <http://www.usac.org/sl/tools/search-tools/form470-search-posted.aspx> (last visited Sept. 14, 2010).

²⁰⁹ See, e.g., Sunesys Comments at 6; Ohio E-Rate Consortium Comments at 4-5.

²¹⁰ See, e.g., Qwest Comments at 2; Sprint Comments at 8; Sunesys Comments at 5; Verizon Comments at 14; AT&T Reply Comments at 2; see also Letter from Tiffany West Smink, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (dated July 27, 2010) (*Qwest Ex Parte*); Letter from Alan Buzacott, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (dated July 30, 2010) (*Verizon Ex Parte*).

²¹¹ Similarly, if an applicant has already posted an FCC Form 470 for a multiyear contract and has signed a multiyear contract as a result of that posting, it does not have to post another FCC Form 470 until the contract expires.

applicants will be required to prepare and submit the newly revised form going forward. The Wireline Competition Bureau will announce the effective date of the new FCC Form 470 once approval has been received from OMB. If an applicant has not submitted an FCC Form 470 by the effective date, the applicant will need to submit the new FCC Form 470.

4. Clarifying Process for Disposal of Obsolete Equipment

73. *E-rate Program Rules and Requirements.* Section 254(h)(3) of the Act prohibits an eligible school or library that has purchased telecommunications services and network capacity at a discount under the E-rate program from reselling or otherwise transferring those services, or any equipment components of such service, in consideration for money or any other thing of value.²¹² In the *Schools and Libraries Third Report and Order*, the Commission also prohibited schools and libraries from transferring the equipment components of eligible services to other schools within three years of their purchase, even without receiving money or other consideration, unless the donating school or library permanently or temporarily closes.²¹³ The Commission also stated that “[r]ecipients of support are expected to use all equipment purchased with universal service discounts at the particular location, for the specified purpose for a reasonable amount of time.”²¹⁴ The Act and the Commission’s rules, however, do not currently specify what schools and libraries are permitted do with equipment components of eligible services acquired with E-rate support once the equipment is obsolete.

74. *Process for Disposal of Obsolete Equipment.* We amend section 54.513(a) of our rules to permit the disposal of equipment components of E-rate services (E-rate equipment) for payment or other consideration, but no sooner than five years after the equipment is installed.²¹⁵ We decline to adopt the reporting and recordkeeping requirements proposed in the *E-rate Broadband NPRM*.²¹⁶

75. First, we revise our rules to permit the disposal of E-rate equipment for payment or other consideration, but no sooner than five years after the equipment is installed. We find that section 254(h)(3) of the Act was intended to address the concern that schools and libraries might resell current telecommunications services and network capacity, and does not address obsolete equipment.²¹⁷ As it is in the public interest and consistent with the Commission’s environmental initiatives and the goal of making technology affordable for all, we encourage schools and libraries to donate and recycle their obsolete equipment whenever possible. To further assist this goal, we direct USAC to make available on its website and update on an ongoing basis a list of donation and recycling locations for communications equipment.

76. We adopt the five-year threshold for a number of reasons. We conclude that five years from the date of installation is a reasonable period of time based on the rate of change in communications

²¹² See 47 U.S.C. § 254(h)(3); see also 47 C.F.R. § 54.513(a); *E-rate Broadband NPRM*, 25 FCC Rcd at 6908, para. 86.

²¹³ *Schools and Libraries Universal Service Support Mechanism*, Third Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 02-6, 18 FCC Rcd 26912, 26923–24, paras. 26–28 (2003)(*Schools and Libraries Third Report and Order*); 47 C.F.R. § 54.513(c). The rules adopted in this report and order do not eliminate the existing requirements for transfer of eligible services or equipment components under section 54.513(c).

²¹⁴ *Schools and Libraries Third Report and Order*, 18 FCC Rcd at 26923, para. 26.

²¹⁵ See Appendix A, 47 C.F.R. § 54.513(a)(1) as amended herein.

²¹⁶ *E-rate Broadband NPRM*, 25 FCC Rcd at 6910, paras. 89-90.

²¹⁷ See 47 U.S.C. § 254(h)(3); 47 C.F.R. § 54.513(c); see also *Schools and Libraries Third Report and Order*, 18 FCC Rcd at 26923-24, para. 9-10; H.R. Rep. No. 104-458, at 110-112 (1996)(Conf. Rep.).

technology and equipment, industry standards for the useful life of E-rate eligible equipment,²¹⁸ and the need for schools and libraries to maintain viable networks that reflect those changes.²¹⁹ Moreover, we find that adopting a straightforward and easy-to-understand rule will help reduce the confusion that has led to applicants either throwing away equipment or to storing the equipment indefinitely because applicants are unsure if disposing of it will violate E-rate rules.²²⁰

77. We conclude that adopting five years as a minimum threshold standard is superior to attempting to discern a specific useful life for each piece of equipment under E-rate. As the E-rate program supports thousands of different pieces of eligible equipment, and as that equipment and the eligible services list is constantly evolving, the burden of verifying the useful life for each piece of equipment would be unduly onerous. In the *Schools and Libraries Third Report and Order*, we discussed the adoption of useful life criteria in the context of transferring services and equipment.²²¹ In that context, we decided not to adopt useful life criteria, finding that “developing and enforcing useful life criteria would add a significant degree of complexity to the program, which would result in increased administrative costs and burden for both recipients and USAC.”²²² We agree that detailing a specific period of useful life for each of the thousands of types of equipment supported under E-rate would be unduly costly and burdensome.²²³

78. We emphasize that this rule does not require schools and libraries to continue using equipment for five years, nor does it require disposal five years after installation, but it does prohibit resale or disposal before five years has passed. We strongly encourage schools and libraries to be the best stewards of E-rate funding possible and to continue to fully use equipment purchased with universal service funds for as long as the equipment remains viable as an effective and efficient technology solution.²²⁴ Additionally, the New York State Education Department inquired whether the disposal of obsolete equipment by a service provider, free of charge, violates section 54.523 of our rules.²²⁵ We conclude that this service does not provide the incentive or inducement for selection that section 54.523 is

²¹⁸ See U.S. Department of the Treasury, Report to The Congress on Depreciation Recovery Periods and Methods at 13-14, 111-112 (July 28, 2000), available at <http://www.ustreas.gov/offices/tax-policy/library/depreci8.pdf> (last visited Sept. 16, 2010); see also, e.g., Federal Accounting Standards Advisory Board, Generally Accepted Accounting Principles, available at <http://www.fasab.gov/accepted.html> (last visited Sept. 14, 2010); CPAClass.com, U.S. GAAP Codification of Accounting Standards, available at <http://cpaclass.com/gaap-accounting-standards/gaap-codification-index.htm> (last visited Sept. 14, 2010).

²¹⁹ See NW-Links Comments at 9; see also Qualcomm Reply Comments at 11; SDUSD Reply Comments at 5-6.

²²⁰ *Schools and Libraries Third Report and Order*, 18 FCC Rcd at 26923, para. 26. Commenters have indicated that without further guidance on how to dispose of the equipment, schools and libraries have been spending money to store obsolete equipment indefinitely. See, e.g., NYSED Comments at 10; see also NY DOE Comments at 6; CDE Comments at 18; NC DPI Comments at 3; UEN Comments at 13; Alaska Department of Education and Early Development and State Library (AEED) Comments at 10.

²²¹ See *Schools and Libraries Third Report and Order*, 18 FCC Rcd at 26925, para. 30.

²²² *Id.*

²²³ We note that leased equipment and wide area telecommunications services under an IRU purchase arrangement does not meet the definition of “purchased equipment” under the new rule. We find that the equipment purchased under these agreements can have a considerable resale value even after five years following installation, and, therefore, disposal or resale for consideration shall not be allowed.

²²⁴ See NW-Links Comments at 9; AEED Comments at 10; NYSED Comments at 10; see also *Schools and Libraries Third Report and Order*, 18 FCC Rcd at 26919-21, 23, paras. 17-19, 26.

²²⁵ See 47 C.F.R. § 54.523; NYSED Comments at 10.

designed to prevent, and therefore we find that free of charge disposal of obsolete equipment by a service provider does not violate section 54.523 of our rules.²²⁶

79. We decline to adopt a time period of three years, as suggested by some commenters.²²⁷ Some schools and libraries transfer equipment from the location that originally sought funding for the equipment to other locations after three years, as permitted by our rules.²²⁸ Those transfers suggest that that equipment may not typically exhaust its useful life within three years. Additionally, although in some instances we allow applicants to receive funding twice every five years to help, in part, allow for updated internal connections, that rule is primarily intended to allow funding to be distributed more equitably.²²⁹ It is not a benchmark for measuring equipment obsolescence.²³⁰

80. Second, we decline to adopt the proposal that would require applicants to formally declare that equipment is obsolete.²³¹ Schools and libraries should make this determination in the normal course as they create technology plans and determine what equipment is required to keep the network running efficiently.²³² Each school and library board has its own established procedures for making this determination. We find that a formal declaration would serve little if any value, and would create an unnecessary administrative burden.²³³ Therefore, we decline to adopt this proposed condition.

81. Third, we decline to adopt a rule that schools and libraries must notify USAC of the resale or disposal of equipment funded by the E-rate program within 90 days of its disposal, or that applicants be required to keep a record of the disposal for a period of five years following the disposal.²³⁴ We also decline to require schools and libraries to track disposal of obsolete equipment on their asset and inventory lists beyond what the current rules already require.²³⁵ As we decline to adopt the reporting requirement, we see little utility in revising the FCC Form 500 as proposed, and we decline to do so.²³⁶ Because we are convinced that the remaining value of equipment purchased using E-rate funds is generally *de minimis* after five years, we find that such reporting requirements do not justify the substantial administrative burden they would impose on both applicants and USAC. Nevertheless, the purpose of permitting applicants to dispose of equipment for money or other consideration is to encourage recycling and optimization of resources. It is not intended to create a profit-making opportunity for E-rate participants or to create incentives to request services that exceed the applicant's immediate needs. Thus, if we have reason to believe that this revised rule results in waste or abuse, we may impose reporting obligations, recover funding, or take other steps to eliminate opportunities for abuse.

²²⁶ *Schools and Libraries Third Report and Order*, 18 FCC Rcd at 26929, para. 41.

²²⁷ See NW-Links Comments at 8; see also Qualcomm Reply Comments at 11; SDUSD Reply Comments at 6.

²²⁸ See 47 C.F.R. § 54.513.

²²⁹ See *Schools and Libraries Third Report and Order*, 18 FCC Rcd at 26918-19, paras. 14-15.

²³⁰ *Id.* at 26917-22, paras. 12-24.

²³¹ *E-rate Broadband NPRM*, 25 FCC Rcd at 6911, paras. 90, 92.

²³² See *Schools and Libraries Third Report and Order*, 18 FCC Rcd at 26920, para. 19.

²³³ See Letter from Marijke Visser, American Library Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (dated Aug. 13, 2010).

²³⁴ *E-rate Broadband NPRM* at 6910-12, paras. 90, 93, 95-96.

²³⁵ See 47 C.F.R. § 54.516; see also 47 C.F.R. § 54.513(c).

²³⁶ See *E-rate Broadband NPRM* at 6912, paras. 95-96.

82. Fourth, we decline to adopt, as a condition of compliance with our E-rate rules, a specific rule that the disposal process must comply with state and local laws.²³⁷ While we expect any schools and libraries disposing of obsolete equipment will comply with applicable federal, state, and local laws, we find that making such compliance a condition of our E-rate program requirements would impose significant administrative burdens on USAC to track such compliance, and that such burden outweighs any potential benefit of imposing such a requirement.²³⁸

83. Finally, we decline to require schools and libraries to return to USAC any funds received in exchange for the sale or disposal of obsolete E-rate equipment. We sought comment on E-rate Central's proposal that would require the return to USAC of any funds greater than \$1,000 related to the resale or disposal of E-rate equipment.²³⁹ Because our intent is to permit disposal only of obsolete equipment, we expect that any consideration that schools or libraries receive should be nominal. Thus we find that the potential recovery does not warrant the administrative burdens that USAC and applicants would face as a result of requiring remission of such amounts.²⁴⁰

84. *E-Rate Central Petition for Clarification or Waiver.* As discussed in the *E-rate Broadband NPRM*, E-Rate Central filed a petition for clarification or waiver of the Commission's rules concerning the disposal of equipment purchased under the E-rate program.²⁴¹ The rules adopted in this order address E-Rate Central's Petition for Clarification or Waiver. Therefore, we dismiss E-Rate Central's petition as moot.

C. Improving Safeguards Against Waste, Fraud and Abuse

85. *Fair and Open Competitive Bidding Rule.* We amend section 54.503 of the Commission's rules to codify the existing requirement that the E-rate competitive bidding process be fair and open.²⁴² The Commission has observed that competitive bidding is vital to ensuring that schools and libraries – and the E-rate program – receive the best value for their limited funds, and to clarify the prohibition against E-rate applicants receiving gifts.²⁴³ Although numerous Commission orders already

²³⁷ See *id.* at 6910, para. 90.

²³⁸ In addition, because any non-compliance likely would not be apparent until five years after E-rate funds had been expended for such equipment, it would be a harsh result to recover funding for services that otherwise had already been used for years in compliance with Commission rules.

²³⁹ *E-rate Broadband NPRM* at 6911, para. 94.

²⁴⁰ See SECA Comments at 2; see also NW-Links Comments at 9; CDE Comments at 18; AEED Comments at 10.

²⁴¹ See *E-rate Broadband NPRM* at 6908-09, paras. 87-88; see also *E-Rate Central Petition for the Clarification or Waiver of E-Rate Rules Concerning the Disposal of Equipment Purchased Under the Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6 (filed Sept. 13, 2006) (E-Rate Central Petition for Clarification or Waiver).

²⁴² See Appendix A, 47 C.F.R. § 54.503 as amended herein; see also *E-Rate Broadband NPRM*, 25 FCC Rcd at 6883-84, para. 27. Most commenters supported this proposal. See, e.g., AT&T Comments at 4-7; Sprint Comments at 6; Internet2 Comments at 1; EMPA Comments at 9; CDE Comments at 7; Miami-Dade Public Schools Comments at 5; EdLiNC Comments at 16-17; NYSED Comments at 4; Kellogg & Sovereign (K&S) Comments at 9; Qwest Comments at 3; Pittsburgh Public Schools Comments at 2; Ohio E-Rate Consortium Comments at 5-10; Texas Education Telecommunications Network (TETN) Comments at 2; SECA Comments at 19-20; E-rate Consultants Reply Comments at 2.

²⁴³ *Universal Service First Report and Order*, 12 FCC Rcd at 9029, para. 480; see also *Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, and 95-72, Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, (continued...)

make clear that, to comply with the Commission's competitive bidding process requirements, applicants and service providers must conduct and participate in a fair and open competitive bidding process, we find that codification of this requirement is warranted.²⁴⁴ We remind parties that all applicants and service providers have had, and will continue to have, an obligation to comply with any applicable state or local procurement laws, in addition to the Commission's requirements.²⁴⁵

86. As proposed in the *E-rate Broadband NPRM*, we find that the following types of conduct are necessary to satisfy a fair and open competitive bidding requirement.²⁴⁶ As a general matter, all potential bidders and service providers must have access to the same information and must be treated in the same manner throughout the procurement process.²⁴⁷ Any additions or modifications to the FCC Form 470, RFP, or other requirements or specifications must be available to all potential providers at the same time and in a uniform manner.²⁴⁸ Moreover, consistent with precedent, it is a violation of the Commission's competitive bidding rules if: (1) the applicant has a relationship with a service provider that would unfairly influence the outcome of a competition or would furnish the service provider with "inside" information;²⁴⁹ (2) someone other than the applicant or an authorized representative of the

(Continued from previous page)

94-1, 91-213, 95-72, 13 FCC Rcd 5318, 5425-26, para. 185 (1997) (stating that the competitive bidding process is a key component of the Commission's effort to ensure that universal service funds support services that satisfy the precise needs of an institution, and that the services are provided at the lowest possible rates); see also FCC Form 471.

²⁴⁴ See *Request for Review by Ysleta Independent School District of the Decision of the Universal Service Administrator*, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26407 (2003) (*Ysleta Order*). See also AT&T Comments at 4-7; AT&T Reply Comments at 3-5; Sprint Comments at 6; Internet2 Comments at 1; EMPA Comments at 9; CDE Comments at 7; Miami-Dade Public Schools Comments at 5; EdLiNC Comments at 16-17; NYSED Comments at 4; K&S Comments at 9; Qwest Comments at 3; Pittsburgh Public Schools Comments at 2; Ohio E-Rate Consortium Comments at 5-10; TETN Comments at 2; SECA Comments at 19-20.

²⁴⁵ See, e.g., *Universal Service First Report and Order*, 12 FCC Rcd at 9078, para. 575; *Ysleta Order*, 18 FCC Rcd at 26424-26, paras. 41-44; see also Appendix A, 47 C.F.R. § 54.503 as amended herein.

²⁴⁶ The listed conduct does not constitute a complete list of conduct necessary to satisfy a fair and open competitive bidding process.

²⁴⁷ See *Ysleta Order*, 18 FCC Rcd 26407; *Request for Review by Mastermind Internet Services, Inc., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028 (2000) (*Mastermind Order*).

²⁴⁸ The Commission's rules do not require an applicant to develop an RFP. However, if the applicant does create an RFP or other document (e.g., Request for Quotes, Scope or Work) that provides additional information regarding the desired services, it must indicate this fact in the appropriate place on the FCC Form 470. Moreover, an applicant that posts an RFP, in addition to posting an FCC Form 470, must post the RFP for at least 28 days before selecting a service provider or signing a contract. See Appendix A, 47 C.F.R. § 54.503 as amended herein; FCC Form 470 at 3, available at <http://www.usac.org/res/documents/sl/pdf/470.pdf> (last visited Sept. 14, 2010). This ensures that all service providers are aware of any additional bid information. It also ensures that the competitive bidding process is open and fair to all service providers.

²⁴⁹ See *Request for Review of the Decision of the Universal Service Administrator by Approach Learning and Assessment Center, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 22 FCC Rcd 5296 (2007) (*Approach Learning Order*) (finding no competitive bidding violation where the named contact person on the FCC Form 470 was not an employee of the selected service provider or any other service provider). We also clarify here that an existing relationship between an applicant and its existing service provider does not violate the rule that the competitive bidding process remain fair and open. See, e.g., ESPA Comments at 3; AT&T Comments at 5; CDE Comments at 7.

applicant prepares, signs, and submits the FCC Form 470 and certification;²⁵⁰ (3) a service provider representative is listed as the FCC Form 470 contact person and that service provider is allowed to participate in the competitive bidding process;²⁵¹ or (4) a service provider prepares the applicant's FCC Form 470 or participates in the bid evaluation or vendor selection process in any way.²⁵² In the *Mastermind Order*, the Commission found that an applicant violates the Commission's competitive bidding rules if the applicant turns over to a service provider the responsibility for ensuring a fair and open competitive bidding process.²⁵³ The Commission concluded in the *SEND Order* that a competitive bidding process is undermined when an applicant employee with a role in the service provider selection process also has an ownership interest in the vendor that is seeking to provide the products or services.²⁵⁴ In the *Ysleta Order*, the Commission found that an applicant violates the Commission's competitive bidding rules if its FCC Form 470 does not describe the desired products and services with sufficient specificity to enable interested parties to submit responsive bids.²⁵⁵ We emphasize that this is not an exhaustive summary of the types of conduct that we have found, and will continue to find, to violate the competitive bidding process. Because we cannot anticipate and address every possible action that parties may take in the E-rate application process, we expect that we will continue to use the appeal process as necessary to decide alleged competitive bidding violations.²⁵⁶

87. In addition to this precedent, we address the receipt of gifts by applicants from service providers and potential service providers under the E-rate program. As noted above, the Commission's rules and precedent require that applicants conduct a fair and open competitive bidding process. In

²⁵⁰ See *Approach Learning Order*, 22 FCC Rcd at 5303-04, para. 19 (concluding that the Commission's competitive bidding rules were violated because there was a connection between the contact person listed on the FCC Form 470 and the selected service provider).

²⁵¹ See *Mastermind Order*, 16 FCC Rcd at 4032, para 9 (noting that to the extent a [service provider] employee was listed as the contact person on the FCC Form 470 that initiated a competitive bidding process in which [the service provider] participated, such Forms 470 were defective and violated the Commission's competitive bidding requirements. In the absence of valid Forms 470, the requests for support were properly denied).

²⁵² See *Approach Learning Order*, 22 FCC Rcd at 5303-04, para. 19. USAC will investigate the appearance of impropriety. For example, an FCC Form 470 that is filed from a service provider's computer or mailed from a service provider's office would seem to indicate that the service provider assisted the applicant in the preparation of the form.

²⁵³ See *Mastermind Order*, 16 FCC Rcd at 4032-34, paras. 10-11.

²⁵⁴ See *Request for Review by SEND Technologies, L.L.C. of the Decision of the Universal Service Administrator*, CC Docket Nos. 96-45, 97-21, Order, 22 FCC Rcd 4950, 4952-53, para. 6 (2007) (*SEND Order*) (finding that applicant's 15 percent ownership interest in service provider resulted in a conflict of interest that impeded fair and open competition).

²⁵⁵ See *Ysleta Order*, 18 FCC Rcd at 26418-26420, paras. 24-28 (stating that an FCC Form 470 that lists virtually all E-rate eligible products and services violates the Commission's competitive bidding requirements). If an applicant intends to develop and release an RFP, the RFP should provide potential bidders with specific information about the desired services and functions. The applicant should also provide at least a general description of the desired services and functions on its FCC Form 470. See FCC Form 470 Instructions at 11-13, available at <http://www.usac.org/res/documents/sl/pdf/470i.pdf> (last visited Sept. 14, 2010). If the RFP contains any additional information that is not on the FCC Form 470, it must be made available to all potential bidders for the duration of the bidding process. See FCC Form 470 at 3, available at <http://www.usac.org/res/documents/sl/pdf/470.pdf> (last visited Sept. 14, 2010).

²⁵⁶ We note that we are still considering the comments received in response to the proposal in the *E-rate Broadband NPRM* barring applicant participation on a service provider board, and therefore we are not ruling on that issue in this order. See *E-rate Broadband NPRM*, 25 FCC Rcd at 6884-85, para. 29.

addition, applicants are required to certify on the FCC Form 471 that they have not received anything of value or a promise of anything of value other than the services and equipment requested on the form.²⁵⁷ In the *NPRM*, we listed gift-giving as one example of prohibited conduct under a fair and open competitive bidding process.²⁵⁸

88. We find that the best approach is to make gift rules under the E-rate program consistent with the gift rules applicable to federal agencies, which permit only certain *de minimis* gifts.²⁵⁹ Generally, the federal rules prohibit a federal employee from directly or indirectly soliciting or accepting a gift (*i.e.*, anything of value) from someone who does business with his or her agency or accepting a gift given as a result of the employee's official position.²⁶⁰ The federal rules do, however, permit two categories of circumscribed *de minimis* gifts: (1) modest refreshments that are not offered as part of a meal (*e.g.*, coffee and donuts provided at a meeting) and items with little intrinsic value intended solely for presentation (*e.g.*, certificates and plaques); and (2) items that are worth \$20 or less (*e.g.*, pencils, pens, hats, t-shirts, and other items worth less than \$20, including meals), as long as those items do not exceed \$50 per employee from any one source per calendar year.²⁶¹ Similarly, the rule we adopt today also allows such *de minimis* gifts. In determining the amount of gifts from any one source, we will consider the aggregate value of all gifts from any employees, officers, representatives, agents, independent contractors, or directors of the service providers. We note that the restriction on gifts is always applicable, and is not in effect or triggered only during the time period when the competitive bidding process is taking place. Based on our experience, gift activities that undermine the competitive bidding process may occur outside the bidding period. Accordingly, we amend section 54.503 of our rules to prohibit E-rate applicants from soliciting or accepting any gift or other thing of value from a service provider participating in or seeking to participate in the E-rate program.²⁶² We further amend that rule to make it a violation for any service provider to offer or provide any gift or other thing of value to those personnel of eligible entities involved with the E-rate program. Like the federal rules, we include an exception for gifts to family and personal friends when those gifts are made using personal funds of the donor (without reimbursement from an employer) and are not related to a business transaction or business relationship.²⁶³

89. We find that the federal rules offer a fair balance between prohibiting gifts that might have undue or improper influence on a procurement decision and acknowledging the realities of professional interactions, which might occasionally involve giving people coffee or other modest

²⁵⁷ See Schools and Libraries Universal Service, Services Ordered and Certification Form at 5, OMB 3060-0806 (November 2004) (FCC Form 471).

²⁵⁸ See *E-rate Broadband NPRM*, 25 FCC Rcd at 6884-85, para. 29; see also, *e.g.*, 47 C.F.R. §§ 1.3001, 1.3002. For example, prohibited gifts would include meals, tickets to sporting events, or trips. An applicant also must not violate its own ethical regulations relating to the acceptance of gifts from a vendor.

²⁵⁹ See Appendix A, 47 C.F.R. § 54.503(c)(5) as amended herein; 5 C.F.R. § 2635.201-205; see also Pittsburgh Public Schools Comments at 2; TETN Comments at 2.

²⁶⁰ See 5 C.F.R. § 2635.201-205. In addition, we note that pursuant to section 3.101-2 of the Federal Acquisition Rules (FAR), "[n]o Government employee may solicit or accept, directly or indirectly, any gratuity, favor, entertainment, loan, or anything of value from anyone who a) has or is seeking to obtain Government business with the employee's agency; b) conducts activities that are regulated by the employee's agency; or c) has interests that may be substantially affected by the performance or nonperformance of the employee's official duties." 48 C.F.R. § 3.101-2.

²⁶¹ See 5 C.F.R. § 2635.203(b).

²⁶² See Appendix A, 47 C.F.R. § 54.503(d) as amended herein.

²⁶³ See Appendix A, 47 C.F.R. § 54.503(d)(3) as amended herein.

refreshments or a token gift. Moreover, the federal rules are well-established and have been interpreted frequently, and parties can look to these decisions if there are questions about the propriety of a particular offering. In addition, we find that this rule is appropriate for ease of administration and also to provide clarity for service providers and applicants. Finally, we emphasize again that schools, libraries, and service providers remain subject to applicable state and local restrictions regarding gifts. Thus, to the extent a state or local provision is more stringent than the federal requirements, violation of the state or local provision constitutes a violation of the Commission rule we adopt herein.²⁶⁴

90. AT&T was concerned that a prohibition against gifts might prevent companies from making charitable contributions to schools, or would deter other philanthropic activities, such as employee donations through United Way.²⁶⁵ The rule we articulate today does not discourage companies from making charitable donations to E-rate eligible entities in the support of schools – including, for example, literacy programs, scholarships, and capital improvements – as long as such contributions are not directly or indirectly related to E-rate procurement activities or decisions.²⁶⁶ If contributions have no relationship to the procurement of E-rate eligible services and are not given by service providers to circumvent our rules, including rules that require schools and libraries to pay their own non-discount share for the services they are purchasing, such contributions will not violate the prohibition against gift-giving.²⁶⁷ If applicants or service providers are unclear about a particular anticipated gift, they should seek guidance from USAC or the FCC.²⁶⁸

91. We also offer greater clarity with regard to permissible service provider identification number (SPIN) changes following a competitive bidding process. In the *NPRM*, we proposed to prohibit a service provider from circumventing a competitive bidding process by offering a new, lower price for products and services that have already been competitively bid and are part of an existing contract.²⁶⁹ The Commission currently permits applicants to change service providers for specified reasons (*e.g.*, the service provider went out of business or is unable to perform) after a funding commitment has been issued through the operational SPIN change process.²⁷⁰ Applicants must wait until after the funding commitment has been issued to enable USAC to review and identify any issues related to the competitive

²⁶⁴ See Appendix A, 47 C.F.R. §54.503 as amended herein.

²⁶⁵ See, *e.g.*, AT&T Comments at 6.

²⁶⁶ See Appendix A, 47 C.F.R. § 54. 503(d)(4) as amended herein.

²⁶⁷ *Id.*

²⁶⁸ As noted above, parties must also comply with applicable state and local requirements, which might bar such contributions.

²⁶⁹ Specifically, in the *E-rate Broadband NPRM*, we proposed to provide the following example: “[o]nce a contract for products or services is signed by the applicant and service provider, a different service provider may not circumvent the bidding process and offer a new, lower price for the same products and services.” See *E-rate Broadband NRPM*, 25 FCC Rcd at 6884-85, para. 29.

²⁷⁰ See, *e.g.*, *Copan Order*, 15 FCC Rcd 5498 (allowing SPIN changes whenever an applicant certifies that (1) the SPIN change is allowed under its state and local procurement rules and under the terms of the contract between the applicant and its original service provider, and (2) the applicant has notified its original service provider of its intent to change service providers). The Commission also stated that SPIN changes are no longer restricted to those categories enumerated in the USAC guidelines (*i.e.*, service provider refuses to participate, has gone out of business, or has breached its contract). *Id.* at 5501, para. 6. See also USAC website, Schools and Libraries, SPIN Change Guidance, available at <http://www.usac.org/sl/about/changes-corrections/spin-change-guidance.aspx> (last visited Sept. 14, 2010).

bidding process of the original service provider.²⁷¹ There may be some instances, however, where the reason for the SPIN change is not consistent with program purposes. For example, the applicant might identify a service provider as the winning bidder but intend to change providers through the SPIN change process as soon as USAC issues a funding commitment. We believe that this type of conduct is inappropriate and is not conducive to a fair and open competitive bidding process. Therefore, to alleviate uncertainty regarding the types of SPIN changes that are permissible following a competitive bidding process, we clarify that once a contract for products or services is signed by the applicant and service provider, the applicant may not change to a different service provider unless (1) there is a legitimate reason to change providers (e.g., breach of contract or the service provider is unable to perform); and (2) the newly selected service provider received the next highest point value in the original bid evaluation, assuming there was more than one bidder.²⁷²

92. Some commenters challenged the statement in the *NPRM* that “[a] service provider may provide information to an applicant about products or services – including demonstrations – before the applicant posts the FCC Form 470, but not during the bid selection process.”²⁷³ They argue that applicants need vendor information during the bid selection process in order to make the best decision about the services they are requesting.²⁷⁴ We agree with these commenters and note that, currently, service providers are permitted to supply information about their products and services during the 28-day waiting period.²⁷⁵ Our concern regarding vendor communication during the 28-day waiting period was not about the specific products or services being requested, but rather about ensuring that potential bidders are not influencing the bidding process by providing inappropriate assistance as explained above.²⁷⁶ Thus, we clarify that we do not prohibit communications during the 28-day waiting period as long as all parties are privy to the same information from the applicant during that period and the communications are consistent with any applicable state or local competitive bidding requirements.

III. ELIGIBLE SERVICES LIST

A. Background

93. Through the E-rate program, eligible schools and libraries may receive discounts for eligible services, including telecommunications services, Internet access, and internal connections.²⁷⁷ Section 254 gives the Commission authority to designate “telecommunications services” and additional services eligible for support through the E-rate program.²⁷⁸ The Commission also has determined that it

²⁷¹ See USAC website, Schools and Libraries, SPIN Change Guidance, available at <http://www.usac.org/sl/about/changes-corrections/spin-change-guidance.aspx> (last visited Sept. 14, 2010).

²⁷² We note that applicants must still comply with the procedures described in the *Copan Order*. See *Copan Order*, 15 FCC Rcd 5498.

²⁷³ *E-Rate Broadband NPRM*, 25 FCC Rcd at 6885, para. 30.

²⁷⁴ See, e.g., EdLiNC Comments at 17; NYSED Comments at 5; AASA & AESA Comments at 3; Qwest Comments at 3; Pittsburgh Public Schools Comments at 2-3.

²⁷⁵ See, e.g., USAC website, Schools and Libraries, Service Providers, available at <http://www.usac.org/sl/about/training-sessions/training-2003/2003-presentations.aspx> (last visited Sept. 14, 2010).

²⁷⁶ See *supra* para. 86.

²⁷⁷ 47 C.F.R. §§ 54.502, 54.503, 54.506, 54.517.

²⁷⁸ 47 U.S.C. § 254(c)(1), (c)(3), (h)(2)(A). Congress charged the Commission with establishing competitively neutral rules to enhance access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms and libraries; and also provided the Commission with the authority to designate “special” or “additional” services eligible for universal service support for schools and libraries. 47 U.S.C. § 254 (c)(3), (h)(2).

has the authority to designate services eligible for E-rate support as part of its authority to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms and libraries.²⁷⁹

94. The ESL, which is posted on the Commission's and USAC's websites, identifies the services and products that are eligible for E-rate funding.²⁸⁰ The Commission's rules direct USAC to submit annually to the Commission its proposed ESL for the upcoming funding year, and the Commission seeks public comment on that proposed ESL.²⁸¹ This process ensures that the Commission and USAC will regularly evaluate whether to modify the ESL to reflect changes in law as well as the marketplace.²⁸²

95. We have previously sought comment on a number of proposed changes to the ESL, including proposals regarding firewall services, anti-virus and anti-spam software, teleconferencing scheduling services, wireless Internet access applications, and web hosting.²⁸³ We also proposed that: (1) eligible products and services should be listed in the ESL and should not be individually listed in the Commission's rules; (2) USAC should be required to submit any proposed changes to the ESL to the Commission by March 30 of each year, instead of June 30; and (3) the ESL would no longer have to be released only by public notice.²⁸⁴

96. For funding year 2011, USAC proposed that the Commission clarify that the following services are ineligible: web hosting, web servers, and domain name registration; software applications that are used in connection with wireless devices; separately priced firewalls; anti-virus and anti-spam software; online backup solutions; and unbundled warranties.²⁸⁵ USAC also included leased dark fiber on the list of miscellaneous services on the ESL in light of the Commission's proposal to provide funding for leased dark fiber.²⁸⁶ The Bureau sought comment on these various proposals.²⁸⁷ We address those proposals below.

B. Discussion

97. In this order, we release the ESL for funding year 2011 and adopt most of the proposals made in the *2009 ESL Further NPRM* and the *2010 ESL Public Notice*. We add dark fiber to the ESL as an eligible service.²⁸⁸ We also retain web hosting as an eligible priority one service.²⁸⁹ Finally, we

²⁷⁹ *Universal Service First Report and Order*, 12 FCC Rcd at 9008-9015, paras. 436-449 (1997); *see also* 47 U.S.C. § 254(h)(2)(A).

²⁸⁰ *See* Appendix A, 47 C.F.R. § 54.522 as amended herein at 54.502(b); *see, e.g.*, Funding Year 2010 ESL.

²⁸¹ *See* Appendix A, 47 C.F.R. § 54.522 as amended herein at 54.502(b).

²⁸² *See Schools and Libraries Second Report and Order*, 18 FCC Rcd at 9213, para. 31; *see also* 47 U.S.C. § 254(c)(2); *Schools and Libraries Third Report and Order*, 18 FCC Rcd at 26926, para. 34.

²⁸³ *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Report and Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 6562, 6578-6581, paras. 34-39 (2009) (*2009 ESL Further NPRM*); *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Notice of Proposed Rulemaking, 23 FCC Rcd 11703 (2008) (*2008 ESL NPRM*).

²⁸⁴ *2009 ESL Further NPRM*, 25 FCC Rcd at 6581-6583, paras. 40-46.

²⁸⁵ *See 2010 ESL Public Notice*.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *See supra* paras. 9-19.

decline to add the following services to the ESL: (1) software applications that are used in connection with wireless devices; (2) enhanced firewalls and intrusion detection/intrusion prevention devices;²⁹⁰ (3) anti-virus and anti-spam software; (4) online backup solutions,²⁹¹ and (5) unbundled warranties.

98. We also make slight modifications to the rules pertaining to ESL administration. First, as explained below, we find that individual eligible and ineligible services should be listed in the ESL only rather than in our rules. Second, we require USAC to submit any proposed changes to the ESL to the Commission by March 30 of each year. Third, the rules will now provide the Commission with flexibility to release the ESL by public notice or order. Finally, because we are releasing the final ESL for funding year 2011 by this report and order, pursuant to our rules, we also authorize USAC to open the annual application filing window no earlier than November 29, 2010.²⁹²

99. The Commission uses several criteria to determine whether to include a service in the ESL. First, under the statute, a service must serve an educational purpose.²⁹³ Second, the service should be primarily or significantly used to facilitate connectivity.²⁹⁴ The E-rate program does not provide support for content or end-user devices such as computers or telephones. Third, due to the financial constraints on the fund,²⁹⁵ we must balance the benefits of particular services with the costs of adding to our list of supported services – *i.e.*, if more services are eligible for E-rate funding, some schools may receive more funding, but some schools may not receive any funding for priority two services.²⁹⁶ We recognize that E-rate may not be able to fund every service that potentially serves an educational purpose, and for that reason we need to evaluate potential impact of adding additional services to the eligible services list. Finally, the Commission must exercise discretion in order to balance the goals of the E-rate program with the overarching (and potentially competing) goals of universal service, such as ensuring affordable rates to all Americans across the country.²⁹⁷ In deciding whether to extend E-rate support to a particular service, the Commission must keep in mind that the support ultimately is paid for by consumers. This balancing bears on each decision about whether to designate a service as eligible or ineligible for E-rate support.

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²⁸⁹ The 2009 ESL Further NPRM proposed to remove web hosting from the eligible services list and stated that web hosting is not essential to the educational purposes of schools and libraries. 2009 ESL Further NPRM, 25 FCC Rcd at 6580, paras. 37-38.

²⁹⁰ The ESL defines intrusion detection/intrusion prevention devices as devices that function in addition to firewalls to monitor, detect, and deter threats to a network from external and internal attacks. See 2011 ESL at 36.

²⁹¹ The ESL defines an online backup solution as a service that provides off-site data storage generally accessible from any Internet connection. See 2011 ESL at 38.

²⁹² See Appendix A, 47 C.F.R. § 54.522 as amended herein at 54.502(b).

²⁹³ 47 U.S.C. § 254(h)(1)(B). “Educational purposes” has been defined as activities that are integral, immediate, and proximate to the education of students or library patrons. *Schools and Libraries Second Report and Order*, 18 FCC Rcd at 9208, para. 17. The Commission also determined there was a presumption that any service provided on a school or library campus serves an educational purpose. *Id.*

²⁹⁴ See 47 U.S.C. § 254(h)(2)(A) (charging the Commission with enhancing access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms and libraries).

²⁹⁵ 47 C.F.R. § 54.507(a); see *supra* para. 34.

²⁹⁶ See *supra* n.10.

²⁹⁷ 47 U.S.C. § 254(b).

1. Eligible Services

100. Web Hosting. Based on the record before us, we find that web hosting should continue to receive priority one funding.²⁹⁸ Comments provided compelling examples of how web hosting is essential for facilitating teaching and learning as well as communication among the entire school community.²⁹⁹ For example, teachers use individual web pages to post homework assignments, collect completed homework from students, post messages to students and parents, and respond to student or parent questions.³⁰⁰ Web pages also can increase learning time outside of school by providing students and parents with 24/7 access to classroom information and supplemental educational resources.³⁰¹ Moreover, parental and family engagement in a child's school has been linked to improved educational outcomes for students.³⁰² Web hosting, as the commenters have shown, is an example of a service that can provide a substantial educational impact for a relatively small cost.³⁰³

101. We are also persuaded that features that facilitate the ability to communicate, such as blogging, e-mailing over a school or library's hosted website, discussion boards, and services that may

²⁹⁸ The draft eligible services list for funding year 2011 proposed to eliminate web servers and domain name registration from the ESL because they are typically included with web hosting services, which we had proposed to remove from the ESL. Because we are retaining web hosting, we also retain web servers and domain name registration as eligible.

²⁹⁹ See generally Schoolwires Comments and Edline and ePals, Inc (Edline) Comments; see also NYSED Comments at 9; eChalk Inc. Comments at 5-6. We also believe that library web pages are essential for the provision of library services to library patrons.

³⁰⁰ Schoolwires Comments at 6-7.

³⁰¹ *Id.* The record is also replete with ways in which web hosting serves the public interest. For example, the ability to have a hosted web page may reduce some of the potential disadvantages that students in rural areas suffer from living long distances from school by providing instant access to school district and classroom information. Schoolwires Comments at 4. We also recognize the benefit that hosted web pages may provide by allowing schools to communicate quickly in times of crisis or to communicate safety and health information such as H1N1 flu virus vaccination scheduling information. See Schoolwires Comments at Appendix 5 (Safety Impact Stories).

³⁰² See, e.g., Nancy E. Hill and Lorraine C. Taylor, *Parent-School Involvement and Children's Academic Achievement - Pragmatics and Issues*; Current Directions in Psychological Science, Aug. 2004, at 13, 161-164, available at <http://www.jstor.org/stable/20182940?seq=3> (last visited Sept. 14, 2010); *What Research Says About Parent Involvement in Children's Education and Academic Achievement*, Michigan Department of Education, available at http://www.education.com/reference/article/Ref_What_Research_Says/ (last visited Sept. 14, 2010); Holly Kreider, Margaret Caspe, Susan Kennedy, Heather Weiss, *Family Involvement Makes a Difference, Evidence that Family Involvement Promotes School Success for Every Child of Every Age, Family Involvement in Middle and High School Students' Education*, Harvard Family Research Project, Harvard Graduate School of Education, available at <http://www.hfrp.org/publications-resources/publications-series/family-involvement-makes-a-difference/family-involvement-in-middle-and-high-school-students-education>, Spring 2007 (last visited Sept. 14, 2010); Suzanne Bouffard, *Tapping Into Technology; The Role of the Internet in Family-School Communication*, July 2008, available at <http://www.hfrp.org/publications-resources/browse-our-publications/tapping-into-technology-the-role-of-the-internet-in-family-school-communication> (last visited Sept. 14, 2010) (finding that while families from some backgrounds were less likely to use the Internet to communicate with schools, all adolescents demonstrated more positive outcomes when their families utilized this technology).

³⁰³ See eChalk Comments at 5 (noting that since the inception of the E-rate program, the total funding committed for the group of vendors that offer web hosting service has been \$89 million or 2.7% of total internet access funding over time); Edline Comments at 20 (stating that the major service providers offering K-12 schools web-based communications services (including both web hosting and e-mail) were estimated to receive roughly \$30 million in USAC funding commitments in funding year 2009, which represents roughly 1.3% of the \$2.25 billion annual fund); see also Schoolwires Reply Comments at 9; Edline Reply Comments at 6-7.

facilitate real-time interactive communication such as instant messaging or chat, should be eligible for E-rate funds as part of a web hosting package.³⁰⁴ Therefore, we revise the ESL to include those features of web hosting. This decision alters prior decisions limiting web hosting support to hosting a school or library's static website and excluded the ability to engage in interactive activity such as blogging.³⁰⁵ We recognize that the transfer of messages across a school's hosted website is functionally equivalent to other services that facilitate the ability to communicate such as e-mail, text messaging, voice mail, and paging. We remind applicants, however, that content – including content created by third-party vendors, and any features involving data input or retrieval – including searching of databases for grades, student attendance files, or other reports – remains ineligible.³⁰⁶ In addition, support for web hosting will not include support for the applications necessary to run online classes or collaborative meetings.³⁰⁷

2. Ineligible Services

102. Wireless Internet Access Applications. We conclude that wireless Internet access applications should remain ineligible for E-rate support.³⁰⁸ The E-rate program generally does not provide support for software or applications.³⁰⁹ Our decision does not contradict the *Schools and Libraries Second Report and Order* determination that wireless telecommunications services on a school bus or a library's mobile unit are eligible for E-rate funding, because in that order the Commission decided to fund the telecommunications service used on school buses, but not any overlying functionalities or applications.³¹⁰ Although some commenters argue that wireless Internet applications

³⁰⁴ See, Edline Comments at 11; see also Letter from Jennifer Richter, Counsel to Edline and ePals, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated Aug. 5, 2010 (*Edline and ePals Ex Parte Letter*) (stating that web hosting services that should be eligible because their primary purpose is for communication include web-based email, web pages, blogs, discussion Boards, chat, and instant messaging). We do not at this time, however, adopt Edline and ePals suggested definition of "web hosted communications." Edline Reply Comments at 12 (suggesting that eligible web-hosted communications services enable one-to-one, one-to-many, or many-to-many communication over the Internet to a public or restricted audience, and facilitate communication as their primary purpose and use). We believe that it is adequate to continue with the current definition as long as we clarify the eligibility of certain web hosting features such as those that facilitate communication.

³⁰⁵ 2009 *ESL Further NPRM*, 25 FCC Rcd at 6573-74, para. 22.

³⁰⁶ See Edline and ePals *Ex Parte Letter* at 3 (recommending that non-communications web hosting tools should not be eligible including a student information system (SIS) that manages a school's grades, attendance, and other data; curriculum software that provides proprietary, third party educational content; financial software that manages accounting; human resources or payroll functions; assessment systems which deliver online tests to assess student achievement; analytics systems which analyze and correlate data across a school district; and any other software/system/service whose primary purpose/use is not communication).

³⁰⁷ We note that we have received several comments asking us to change the current language in the ESL which states that Internet-based distance learning services such as web meetings or on-line collaboration solutions are not eligible as Internet access services. See, e.g., Generic Conferencing, LLC Comments. They assert that such services could be eligible as priority one information services. While we are interested in the concerns raised by these commenters, we find that we should first seek public comment on these proposals before we address them. We intend to examine these proposals more closely in the future, and, if necessary, seek additional comment.

³⁰⁸ See 2009 *Further ESL NPRM*, 25 FCC Rcd at 6580-81, para. 39. Such applications include, but are not limited to, applications that could be used on school buses to transmit emergency information, track students, and locate buses with global positioning service (GPS) technology.

³⁰⁹ Currently, we provide E-rate funds for only a few categories of software are eligible for E-rate funding, - operating system software, e-mail software, and software for a server-based, shared voice mail system. See Funding Year 2010 ESL at 11-19 (explaining the products and services eligible as internal connections).

³¹⁰ *Schools and Libraries Second Report and Order*, 18 FCC Rcd at 9209, n.28.

should be funded if they are used for an “educational purpose,”³¹¹ we find that even if certain of these applications do serve educational purposes, they should not be funded given the overall constraints on the universal service fund, and our desire to maintain the focus of E-rate on its core purpose of ensuring communications connectivity. Thus, we are not persuaded that expanding eligibility to fund wireless Internet access applications at this time is a prudent course of action.

103. We disagree with commenters that applications for wireless devices should be eligible if they are bundled with eligible voice and data services.³¹² Such an approach would allow providers in effect to expand the ESL by bundling ineligible wireless applications with eligible services. Although we do not prohibit providers from choosing how to offer their services, individual ineligible services within the bundle will still need to be cost allocated. To the extent that carriers bundle eligible and ineligible services and do not present a reasonable cost allocation between the services, we direct USAC to continue to provide outreach to applicants during the program integrity assurance review process and make determinations based on any additional information provided in the discussions and information-sharing with applicants.

104. Funds for Learning asserts that the language in the draft 2011 ESL appears to say that applicants may not receive discounts on any data charges used for accessing wireless applications.³¹³ This language was intended to indicate that wireless Internet access service and data charges for a service that is solely dedicated to accessing an ineligible functionality is ineligible for E-rate funding. For example, wireless Internet access service that enables students to access the Internet on a laptop computer will still be eligible for E-rate funding even if that service happens to allow a student to access applications that would not be eligible for E-rate funds. If a wireless Internet access service is dedicated to a service or group of services that are ineligible, however, the entire service request will be deemed ineligible. For example, a wireless service solely dedicated to applications that track the location of a school’s bus drivers or student attendance would be fully ineligible.³¹⁴

105. Enhanced Firewalls, Intrusion Detection/Intrusion Prevention Devices, Anti-Virus and Anti-Spam Software. Firewall services are intended to prevent unauthorized access to a school or library’s network. Anti-virus and anti-spam software and intrusion protection and intrusion prevention devices monitor, detect, and deter threats to a network from external and internal attacks. We decline to extend E-rate support to anti-virus and anti-spam software and intrusion protection and intrusion prevention devices.³¹⁵ We will continue to fund basic firewall protection, but we will not at this time extend E-rate support beyond basic firewall protection that is included as part of an Internet access service.³¹⁶ While some commenters support greater support for firewall services, contending that such

³¹¹ See, e.g., Sprint Comments at 10; Verizon Comments at 4, Clearwire Comments at 5, and Synovia Comments at 1-3. “Educational purposes” has been defined as activities that are integral, immediate, and proximate to the education of students or library patrons. *Schools and Libraries Second Report and Order*, 18 FCC Rcd at 9208, para. 17. The Commission found that examples of educational purposes included wireless telecommunications services on a school bus or on a library’s mobile unit van. *Id.* at 9209, n.28. Some assert only that the wireless Internet access service underlying such applications should be eligible. See Sprint Comments at 10-11; Funds for Learning (FFL) Comments at 4.

³¹² See FFL Comments at 5; EMPA Comments at 22; K&S Comments at 29.

³¹³ See FFL Comments at 3.

³¹⁴ See Verizon Comments at 4-5; Sprint Comments at 10-11.

³¹⁵ Anti-virus is already listed in the ESL as an ineligible application. Funding Year 2010 ESL at 18.

³¹⁶ Funding Year 2010 ESL at 8 (stating that eligible Internet access may include features typically provided for adequate functionality and performance when provided as a standard component of a vendor’s Internet access (continued...))

services are necessary protection for Internet services and equipment,³¹⁷ we must balance the benefits of such protections with the costs of augmenting our list of supported services. We are concerned about the financial impact on the fund – *i.e.*, if more services are eligible for E-rate funding, fewer schools will get funding for priority two services. Although we agree that protection from unauthorized access is a legitimate concern, the funds available to support the E-rate program are constrained. Therefore, we find that, on balance, the limited E-rate funds should not be used to support these services.

106. *Unbundled Warranties*. We add unbundled warranties to our list of ineligible basic maintenance of internal connections (BMIC). This conforms to the decision we made last year that unbundled warranties are ineligible.³¹⁸ The Commission has found that basic maintenance services are eligible for universal service support as priority two internal connections service if, but for the maintenance at issue, the internal connection would not function and serve its intended purpose with the degree of reliability ordinarily provided in the marketplace to entities receiving such services.³¹⁹ USAC has treated as an unbundled warranty a separately priced warranty allowing for broken equipment to be fixed or, in the event that the problem is beyond repair, replaced.³²⁰ We find that an unbundled warranty is an ineligible BMIC service because it is purchased as a type of retainer and not as an actual maintenance service. That is, BMIC contracts that require an upfront payment and that payment is required regardless of whether any service is actually performed are not eligible. In light of the limited funds available for the program, we decline to include support for service that may not need to be performed. To avoid the potential waste of E-rate resources, therefore, we will continue to disallow E-rate discounts for unbundled warranties.

107. Requests for basic maintenance will continue to be funded as internal connections if, but for the maintenance at issue, the service would not function and serve its intended purpose with the degree of reliability ordinarily provided in the marketplace to entities receiving such services. Thus, requests for routine maintenance will continue to be funded. In addition, if applicants are able to estimate a certain number of hours per year for maintenance, based on the current life of their equipment and a history of needed repairs and upkeep, they may seek E-rate funds for upfront costs on service contracts designed to cover this estimate of repairs and upkeep. Reimbursements will be paid on the actual work performed and hours used only. For example, if a school determines it will need 30 service hours in a given year to maintain its internal connections but uses only 20 hours, the school will be reimbursed only for 20 hours even if they were approved for E-rate funds on 30 hours. We find that this procedure will ensure that E-rate funds will be used only for actual maintenance performed.

108. We understand from the comments that there may be confusion about the eligibility of manufacturer's warranties.³²¹ The language in the ESL under the entry for "Miscellaneous Fees and

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service). When seeking comment on enhanced firewalls, we had described them as "separately priced" firewalls. See 2009 Further ESL NPRM, 25 FCC Rcd at 6578-6579, para. 34.

³¹⁷ See NY OCFS Comments at 4; EMPA Comments; FFL Comments at 7; K&S Comments; AT&T 2008 ESL NPRM Comments at 8; ESPA 2008 ESL NPRM Comments at 13. Funds for Learning states that applicants could benefit by adding protective services and devices to their networks to make their firewalls "smarter." See FFL Comments at 7.

³¹⁸ See 2009 Further ESL NPRM, 25 FCC Rcd at 6576, para 28.

³¹⁹ *Schools and Libraries Third Report and Order*, 18 FCC Rcd at 26921-22, para. 23; see also 47 C.F.R. § 54.506(b).

³²⁰ Funds for Learning is correct that a definition of unbundled warranty was left out of the ESL for funding year 2010. FFL Comments at 8. This, however, was an oversight. USAC's definition, however, was provided in the order releasing the Funding Year 2010 ESL. 2009 Further ESL NPRM, 25 FCC Rcd at 6576, para 28.

³²¹ See SECA Comments at 50; CDE Comments at 17.

Charges,” states that, “a manufacturer’s multi-year warranty provided as an integral part of an eligible component without separately identifiable cost can be included in the cost of the component.”³²² We agree with commenters that a manufacturer’s warranty of no more than three years that is included in the price of eligible equipment should continue to be eligible as priority two internal connections equipment, and add the clarification of the three year period to the ESL.³²³ In the same entry for “Miscellaneous Fees and Charges,” however, it states that “[e]xtended warranties and service contracts are eligible only for that portion associated with the relevant funding year.” We will remove this language from the ESL for funding year 2011 to eliminate any implication in the ESL that an unbundled warranty may be eligible for E-rate funding.

109. *Other Ineligible Services.* We also decline to designate scheduling services and online backup solutions as eligible for E-rate funding. Given the overall constraints on the universal service fund, and our desire to maintain the focus of E-rate on its core purpose of ensuring communications connectivity, we are not persuaded that expanding eligibility to fund these services at this time is a prudent course of action.³²⁴

3. Administrative Changes Pertaining to the ESL

110. We adopt the proposal in the *2009 ESL Further NPRM* to restructure our rules such that the services eligible for support will be listed in the ESL and will not specified in the Commission’s rules. Any reference to specific services or products in the rules will be removed and the revised rule regarding the ESL will state that all products and services eligible for E-rate support will be listed in the ESL.³²⁵ This change will help the Commission ensure that the ESL is updated in a timely manner. We find that listing general categories of eligible services in the rules and specific types of eligible services that fall within those categories of eligible services in the ESL is confusing. Moreover, it does not serve the public interest to change both the Commission’s rules and the ESL each time a new service or product is designated eligible (or ineligible) for E-rate support. Therefore, to alleviate this confusion, we will list the services and products eligible for E-rate support only in the ESL. This change will enable the Commission to modify the ESL only as necessary to keep up with rapidly changing technology. We note that the Commission will continue to seek comment on each funding year’s proposed ESL, pursuant to our rules.³²⁶ Additionally, we will modify our rules pertaining to the ESL when necessary to designate new categories of services as eligible for E-rate support.

111. We also adopt the proposal that USAC should be required to submit any proposed changes to the ESL to the Commission by March 30 of each year, instead of June 30. Accordingly, we amend section 54.522 of our rules.³²⁷ We agree with commenters that requiring USAC to submit the proposed ESL earlier will allow additional time for the Commission to review the proposal and to review and analyze public comment on the proposed ESL.³²⁸ Some commenters also propose that we release the

³²² See 2011 ESL at 22.

³²³ See SECA Comments at 50; CDE Comments at 17.

³²⁴ See SECA Comments at 39 (asserting that only the items that are essential for transporting information to classrooms and libraries should be eligible and by limiting the scope of eligible priority two services and equipment, more funding will be available to applicants that have not traditionally had access to funding).

³²⁵ In addition to making the rule changes described herein, we also consolidate all of the rules pertaining to eligible services in section 54.502. See Appendix A, 47 C.F.R. § 54.502 as amended herein.

³²⁶ See Appendix A, 47 C.F.R. § 54.502(b) as amended herein.

³²⁷ *Id.*

³²⁸ See, e.g., AT&T Comments at 21-22.

ESL earlier than the existing deadline.³²⁹ Although we agree that applicants should have ample time to review the final ESL while they prepare their funding applications, the existing rule requires the final ESL to be released at least 60 days prior to the opening of the funding window.³³⁰ We find that this 60 day period, in addition to the period of time applicants had to review the proposed changes released in the draft ESL, should afford applicants a reasonable amount of time to understand any changes to the ESL and prepare their applications.

112. Finally, we adopt our proposal that the final ESL should no longer be required to be released by public notice.³³¹ We find that it is important that the Commission have the flexibility to release the ESL through a public notice or an order to account for the situations where the Commission will need to provide more detailed explanations as to why a service is deemed eligible or ineligible for E-rate funding. We wish to dispel any concerns that this change would eliminate the opportunity for public comment on any modifications to the ESL.³³² Indeed, the proposed rule attached to the *2009 ESL Further NPRM* states that “[t]he Wireline Competition Bureau will issue a Public Notice seeking comment on the Administrator’s proposed eligible services list,” and we adopt that proposed rule herein.³³³

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

113. As required by the Regulatory Flexibility Act of 1980 (RFA),³³⁴ the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) relating to this Report and Order. The FRFA is set forth in Appendix D.

B. Paperwork Reduction Act Analysis

114. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

115. In this present document, we establish a trial program to investigate the merits and challenges of wireless off-premises connectivity services, and to help us determine whether and how they should ultimately be eligible for E-rate support.³³⁵ We have assessed the effects of this trial program and find that any information submitted by the applicants to the Commission as part of this program will not significantly impact the burden on small businesses. The trial program is limited to schools and libraries that are already implementing or planning to implement wireless off-campus learning, therefore, any

³²⁹ *Id.*; CenturyLink Reply Comments at 6.

³³⁰ *See* Appendix A, 47 C.F.R. § 54.502(b) as amended herein.

³³¹ *2009 ESL Further NPRM*, 25 FCC Rcd at para. 46.

³³² *See, e.g.*, Verizon Comments at 14-15; CenturyLink Reply Comments at 5.

³³³ *See* Appendix A, 47 C.F.R. § 54.502(b) as amended herein.

³³⁴ *See* 5 U.S.C. § 604. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (“CWAAA”).

³³⁵ *See supra* paras. 41-57.

information collected from participants in this program is limited to information about their current projects.

C. Congressional Review Act

116. The Commission will include a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

V. ORDERING CLAUSES

117. ACCORDINGLY, IT IS ORDERED, that pursuant to the authority contained in sections 1 through 4, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 254, 303(r), and 403, this report and order IS ADOPTED.

118. IT IS FURTHER ORDERED, that pursuant to the authority contained in sections 1 through 4, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 254, 303(r), and 403, sections 54.501-54.508, 54.511, 54.513, 54.517-54.519, and 54.522 of the Commission's rules, 47 C.F.R. §§ 54.501-54.508, 54.511, 54.513, 54.517-54.519, and 54.522, ARE AMENDED as set forth in Appendix A, effective thirty (30) days after the publication of this report and order in the Federal Register.

119. IT IS FURTHER 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 pursuant to the authority delegated in sections 0.91, 0.291, 1.3 and 54.723(b) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3 and 54.722(a), that the Petition for Clarification or Waiver filed by E-rate Central, as identified in paragraph 84 herein, IS DISMISSED.

120. IT IS FURTHER 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 pursuant to the authority delegated in sections 0.91, 0.291, 1.3 and 54.723(b) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3 and 54.722(a), that the Petition for Clarification filed by E-rate Central, as identified in paragraph 69 herein, IS DISMISSED.

121. IT IS FURTHER 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 pursuant to the authority delegated in sections 0.91, 0.291, 1.3 and 54.723(b) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3 and 54.722(a), that the Request for Waiver and Clarification filed by the West Virginia Department of Education, as identified in paragraph 33 herein, IS DISMISSED AS MOOT.

122. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of the Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary