



October 22, 2012

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

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

Dear Ms. Dortch:

On September 21, 2012, the Universal Service Administrative Company (“USAC”) issued a Schools and Libraries News Brief that included a discussion of the “lowest corresponding price” (“LCP”) obligation of the Schools and Libraries Universal Service (“E-rate”) Program. The News Brief appears to restate, with additional legal citations, the LCP material included in the service provider training slides used by USAC at its May 10, 2012 and May 15, 2012 training sessions.<sup>1</sup> We respectfully submit this letter to address this recent development and to reiterate our objections to USAC’s actions, which raise serious legal and practical concerns.

As set forth in our July 10, 2012 letter,<sup>2</sup> we met in early July with staff of the Wireline Competition Bureau’s Telecommunications Access Policy Division and objected to the LCP material in USAC’s training slides. At the meeting, we discussed our pending Petition for Declaratory Ruling,<sup>3</sup> which explains that the entire E-rate program, including the LCP obligation, is based on the fundamental requirement that schools and libraries desiring E-rate

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<sup>1</sup> It appears that those same slides are now being used at training sessions this fall. See E-Rate Program, Program Compliance, Fall 2012 Applicant Trainings, [http://usac.org/\\_res/documents/SL/training/2012/fall-program-compliance.pdf](http://usac.org/_res/documents/SL/training/2012/fall-program-compliance.pdf) (last visited Oct. 22, 2012).

<sup>2</sup> Letter from David B. Cohen, United States Telecom Association, and Scott K. Bergmann, CTIA—The Wireless Association®, to Marlene H. Dortch, FCC, CC Docket No. 02-6 (July 10, 2012).

<sup>3</sup> *Petition of United States Telecom Association and CTIA–The Wireless Association® for Declaratory Ruling Clarifying Certain Aspects of the “Lowest Corresponding Price” Obligation of the Schools and Libraries Universal Service Program* (Mar. 19, 2010) (“Petition”).

support take their services from a competitive bid submitted by a provider in response to a Form 470. That filing also explains that the LCP rule has been the subject of little regulatory or administrative development since it was first adopted more than fourteen years ago. For these reasons, we raised both substantive and procedural objections to USAC's training slides. Among other arguments, we disagreed with USAC's suggestion that the LCP applies outside the competitive bidding context and noted the significant limitations on USAC's ability to issue binding interpretations of *any* FCC rule, including the LCP obligation. We suggested that the better course was for the Commission to refresh the record and act on the Petition on a prospective basis.

The recent News Brief only confirms our concerns about USAC's actions with respect to the LCP obligation. In the News Brief, USAC essentially restates the LCP material previously included in its service provider training slides and adds new legal citations. Several of those citations, however, clearly reveal that USAC is attempting, in excess of its authority, to "make policy" or "interpret unclear provisions of the statute or rules." 47 C.F.R. § 54.702(c).

In several statements, USAC suggests that the LCP applies outside the context of competitive bids submitted by a provider in response to a Form 470 and that it imposes a continuing obligation that entitles a school or library to a constantly recalculated lowest corresponding price during the term of a contract:

- "The service provider's obligation to provide the LCP is not tied to a response to an FCC Form 470 or Request for Proposals (RFP). The service provider must actually charge a rate that is the LCP, not just offer the LCP in a bid response. *See* 47 C.F.R. § 54.511; 47 C.F.R. § 54.500(f)."
- "A service provider should be aware that a customer participates in E-rate for several reasons, including the fact that a service provider receives a copy of the FCC Form 471 Receipt Acknowledgment Letter (RAL) and the Funding Commitment Decision Letter (FCDL). However, if a service provider does not know that a customer participates in E-rate and therefore does not charge the LCP, the service provider must actually charge the LCP once it realizes the customer participates in E-rate. *See* 47 C.F.R. § 54.511; 47 C.F.R. § 54.500(f)."
- "The applicant is not obligated to ask for it, but must receive it. *See Federal-State Joint Board on Universal Service*, 12 FCC Rcd 87, 383 ¶ 540."

None of USAC's legal citations, however, state that the LCP applies outside the competitive bidding context or that it is a continuing obligation. The two FCC rules cited by USAC impose the obligation, *see* 47 C.F.R. § 54.511(b) ("Providers of eligible services shall not charge ... above the lowest corresponding price for supported services ... ."), and define the LCP, *see id.* § 54.500(f) ("[T]he lowest price that service provider charges to non-residential

customers who are similarly situated ... for similar services.”), but neither says anything about *when* the obligation attaches. In fact, USAC’s citation to the recommendations of the Federal-State Joint Board on Universal Service suggests that the LCP was specifically intended to be a part of the competitive bidding process. *See Federal-State Joint Board on Universal Service, Recommended Decision, 12 FCC Rcd 87, 383 ¶ 540 (1996)* (“In the context of competitive bidding, the lowest corresponding price would act as the ceiling on the pre-discount price offered to schools and libraries.”).

USAC’s attempt to impose the LCP outside the competitive bidding context thus presents serious legal questions. As noted above, USAC “may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.” 47 C.F.R. § 54.702(c). But that is precisely what USAC is attempting to do. Based on the legal authority that USAC itself has cited, it is clear that USAC has adopted principles and policies of its own making. Moreover, even if the cited authorities could be considered ambiguous, the courts have made clear that a new interpretation of an ambiguous rule cannot serve as the basis for retroactive liability. *See, e.g., Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000); *see also Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012).<sup>4</sup>

Fundamentally, the problem is that the E-rate marketplace has changed significantly since the Commission adopted the LCP obligation more than fourteen years ago. The E-rate program now supports a wide variety of communications services over a number of different platforms, including wireline, wireless, and satellite, as well as Internet, and internal connections products and services, all of which are subject to significant competition. Schools and libraries today can and do take service outside the competitive bidding process from publicly available service offerings, such as tariffs, state master contracts, or standardized retail rates. It stands to reason that the Commission might want to reconsider or update the LCP obligation in light of these changes. But, however well intentioned, USAC has improperly assumed that responsibility and done so without gathering any facts or creating any sort of record. The result is new and unenforceable “guidance” that still does not accord with reality and is, for all practical purposes, unworkable.

In sum, we renew our objections to USAC’s actions with respect to the LCP obligation. USAC’s conclusions about the LCP raise serious legal and practical concerns. Recognizing that the E-rate marketplace has changed over the last fourteen years, we again suggest that the

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<sup>4</sup> For the same reasons, we object to USAC’s actions to the extent it seeks to define the term “similarly situated,” 47 C.F.R. § 54.500(f), which the E-rate rules specifically do not define.

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appropriate course for resolving questions about the LCP obligation is for the Commission to refresh the record and act on our Petition on a prospective basis and even consider reworking the LCP framework entirely.

Sincerely yours,

*/s/ David B. Cohen*

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