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Ex Parte Notice

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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

Response to Reply Comments -- WCB Public Notice Seeking Comments on Elimination of the “Bundling Rule” Adopted in the Gift Rule Clarification Order

Dear Ms. Dortch:

In Reply Comments to the Commission’s *Public Notice Regarding the Eligibility of Bundled Components Under the Schools and Libraries Program*, the State E-rate Coordinators Alliance (“SECA”) claimed: “Only one commenting party challenged the underlying concerns that prompted SECA to file the Petition for Clarification.” That party, SECA said, was Funds For Learning (<http://apps.fcc.gov/ecfs/document/view?id=7022422749> at p.4).

For the record, I wish to point out that, during both the initial and reply comment periods, other commenters also questioned SECA’s underlying concerns and assumptions about how much the bundling of “free” ineligible services actually costs and is likely to cost the E-rate program. For example, here is an excerpt from T-Mobile USA’s reply comments, citing comments submitted by Sprint-Nextel Corporation, Jive Communications, Inc. and NetDiverse, LLC:

II. THERE IS NO EVIDENCE THAT THE GIFT RULE CLARIFICATION ORDER IS LEADING TO UNINTENDED CONSEQUENCES THAT WILL STRAIN THE FUND

As Sprint points out in its initial comments, there is no evidence that the bundling rule is increasing the prices of reimbursable services and placing a strain on the fund.² The Public Notice proposes to eliminate the bundling rule based on a “concern that an open-ended interpretation and widespread use and expansion of this exception could lead to further strain

on the E-rate fund, which is capped and already oversubscribed.”³

Neither the Public Notice nor the record in this proceeding presents evidence, however, that the bundling rule has in fact increased reimbursements from the fund or placed the fund under any strain. Commenters have presented vague, anecdotal accounts of instances in which, for example, interconnected voice over Internet protocol (“VoIP”) providers are offering free VoIP phones along with supported VoIP service.⁴ The State E-rate Coordinators’ Alliance (“SECA”) presents a single example in which an interconnected VoIP provider offered a school district a VoIP package with bundled handsets that would have increased the price of the service by about \$43,000 per year, but this example itself would be eliminated by SECA’s own proposed clarification, and should be addressed by the Commission’s existing rules.

The bundling rule has numerous benefits, as described in these comments;⁶ it would be clear error for the Bureau to eliminate it based solely on “concerns” and anecdotes with no concrete factual foundation. (Emphasis added).

² Comments of Sprint Nextel Corporation, WC Docket No. 02-6 (filed May 23, 2013) at 2-3 (“Sprint 2013 Comments”).

³ Public Notice at ¶ 7.

⁴ *See, e.g.*, Comments of Jive Communications, Inc., WC Docket No. 02-6 (filed Sept. 10, 2012); Comments of NetDiverse, LLC, WC Docket No. 02-6 (filed Sept. 10, 2012).

(<http://apps.fcc.gov/ecfs/document/view?id=7022422987>)

In its Reply Comments, SECA also stated that “Funds for Learning failed to address the evidence that SECA shared in its September 24, 2013 Reply Comments concerning price inflation of bundled VOIP handset service.” That is true, but it was only because the evidence that SECA offered failed to support the case it was trying to make. It is worth noting here too that the evidence that SECA points to also happens to be the “single example” that T-Mobile mentioned and quickly discredited in the portion of its reply comments that we excerpted above. Contrary to SECA, T-Mobile observed that the Commission’s “existing” rules should eliminate this as an issue, especially if the Commission clarifies them.

SECA claims that this one example, together with the evidence that it says it has but is unwilling to share publicly, proves that aggressive bundling of ineligible end-user devices with eligible services will dramatically increase the demand for E-rate funds. In fact though, SECA’s example actually proves the opposite. It proves, as I will discuss in more detail below, that the Commission current rules will not allow vendors to game the system by, for example, bundling ineligible tablets or VoIP handsets with eligible P1 services and then marketing those bundles only to schools and/or libraries.

This is the example that SECA faulted FFL for not mentioning:

SECA knows of one national vendor that, in response to an RFP for hosted VOIP services, proposed the monthly price of interconnected VOIP that included bundled handsets at 28/seat (or per line) for a three-year contract. The same service –interconnected VOIP -- was priced at \$22 per month without VOIP handsets for the same three-year contract. Multiple school districts were offered the identical bundled pricing by this vendor.

In one proposal to a small district representing approximately 5000 students and five school buildings, the district sought 601 lines, which resulted in a difference of \$3,606 between the monthly price of VOIP service without handsets and the monthly price with handsets. This calculates to an annual difference of \$43,272. Over the life of the three year contract, this applicant's pre-discount price would have been \$129,816 higher had they selected the service offering that included the costs of the bundled VOIP handsets – and this is just one small district - If just 200 similarly sized applicants applied for E-rate discounts on such bundled services, Priority 1 demand would increase nearly \$26 million. Multiply that figure by the number of districts in the country in need of a new phone system and Priority 1 demand would be consumed by bundled VOIP service alone.

SECA's concern is not just hyperbole; it is a genuine concern rooted in fact. SECA remains prepared to file the detailed information under confidential seal should the FCC wish to examine the particular data. Indeed Broadcore agreed that bundling ineligible end user equipment in Priority 1 services may create additional upward pressure on demand.

This example is frightening to be sure, but it fails completely to support the argument that SECA is trying to make, as it rests entirely on the faulty premise that bundles like this one, offered only to school districts, are eligible. They are not. Any offer to bundle something ineligible with something eligible that a vendor makes only to school districts is an offer that the vendor has very likely designed to take advantage of the E-rate program, and that is precisely the kind of offer that *Gift Rule Clarification Order* (“*Clarification Order*”) was designed to, and will in fact, stop.

Nevertheless, SECA apparently believes that, to qualify a “bundle” for an exemption under the *Clarification Order*, all a vendor has to do is offer it to more than one school district. That, however, is not what the *Clarification Order* says. In fact, it says just the opposite. It explains in very clear terms that "service providers cannot offer special equipment discounts or equipment with service arrangements to E-rate recipients that are not currently available to some other class of subscribers or segment of the public." (Emphasis added). There is no ambiguity in that statement. Interpreting it to mean that E-rate recipients may be considered, for purposes of the *Clarification Order*, “some other class of subscribers” would turn the rule completely upside down. Indeed, it

would make no sense.

Therefore, if a vendor offers bundled VoIP handsets only to E-rate recipients (school districts and/or public libraries), it could not possibly be making it available “currently” to “some other class of subscribers” and thus will not hold up under the *Clarification Order*. Absent any evidence that the vendor in SECA’s example made the exact same offer of bundled VoIP handsets to “some other class of subscribers or segment of the public” besides school districts, and there does not appear to be any or else SECA would have mentioned it, any school district that accepted the vendor’s offer would have no choice under the existing rules but to cost allocate out of its funding request the value of the ineligible VoIP handsets. This means that so long as USAC administers the *Clarification Rule* properly, which should not be difficult, it will be impossible for a \$26 million doomsday scenario involving VoIP handsets, which SECA says it fears, to materialize.

It is also worth pointing out that if a vendor, like the one in SECA’s example, offers a school district two options, one with and one without VoIP handsets, and the option without equipment is less expensive, it is highly unlikely that the school district could get away with selecting the more expensive one. There are two reasons for this.

First, as T-Mobile pointed out in its reply comments, another vendor is likely to offer a price for the eligible service alone that undercuts the first vendor’s bundled price. Inasmuch as the rules require the school district to give the cost of eligible services the most weight when it decides between or among offers, it is highly unlikely that the school district would be able to opt for the more expensive eligible/ineligible bundle in those circumstances -- not legitimately anyway.

Second, even if there was no other vendor on the scene, the more expensive bundled option obviously would not be the school district’s most cost effective means of securing the eligible service. And because the handsets would not be considered “ancillary” in those circumstances, the school district, under the Commission’s existing rules, would be stuck with only two options, neither of which would result in E-rate support for ineligible VoIP handsets: (1) select the less expensive service option or (2) cost allocate the price of the VoIP handsets out of the bundled service/equipment option.

We appreciate this opportunity to supplement the record.

Sincerely,

/s/ John D. Harrington

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