

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Modernizing the E-rate	)	WC Docket No. 13-184
Program for Schools and Libraries	)	

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**INITIAL COMMENTS OF NATIONAL ASSOCIATION OF STATE  
UTILITY CONSUMER ADVOCATES**

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Charles Acquard, Executive Director  
NASUCA  
8380 Colesville Road, Suite 101  
Silver Spring, MD 20910  
Phone (301) 589-6313  
Fax (301) 589-6380

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**I. INTRODUCTION AND SUMMARY**

The National Association of State Utility Consumer Advocates (“NASUCA”)<sup>1</sup> welcomes the opportunity to respond to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking on the E-rate program.<sup>2</sup> NASUCA applauds President Obama’s announcement for the ConnectED initiative aimed at connecting all schools to the digital age.<sup>3</sup> The ConnectED initiative seeks to

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<sup>1</sup> NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority. NASUCA did not submit initial comments in this proceeding.

<sup>2</sup> In the Notice of Proposed Rulemaking (“NPRM”) released on July 23, 2013, the FCC announced the initiation of a thorough review and update of the E-rate program (more formally known as the schools and libraries universal service support mechanism), building on reforms adopted in 2010 as well as the Commission’s reforms of each of the other universal service programs. The FCC noted that during the past 15 years, the financial support provided by the E-rate program has helped revolutionize schools’ and libraries’ access to modern communications networks. E-rate-supported Internet connections are crucial for learning and for the operation of modern schools and libraries. Increasingly, schools and libraries require high-capacity broadband connections to take advantage of digital learning technologies that hold the promise of substantially improving educational experiences and expanding opportunity for students, teachers, parents and whole communities. As a result, there is a growing chorus of calls to build on the success of the E-rate program by modernizing the program and adopting clear forward-looking goals aimed at efficiently and effectively ensuring high-capacity connections to schools and libraries nationwide. *In the Matter of Modernizing the E-rate Program for School and Libraries*, WC Docket No. 13-184, Notice of Proposed Rulemaking, FCC 13-100, released on July 23, 2013. Comments are due on September 16, 2013 and Reply Comments on October 16, 2013.

<sup>3</sup> See The White House, Office of the Press Secretary, *ConnectED: President Obama’s plan for Connecting All Schools to the Digital Age* available at

connect schools and libraries serving 99 percent of our students to next-generation high-capacity broadband (with speeds of no less than 100 Mbps and a target speed of 1 Gbps) and to provide high-capacity wireless connectivity within those schools and libraries within five years.<sup>4</sup> President Obama has called on the Commission to modernize and leverage the E-rate program to help meet those targets. Teachers, local school officials, state education leaders, digital learning experts, and businesses from across the country endorsed President Obama's vision and have called for an update to the E-rate program to meet today's teaching and learning needs.

Yet NASUCA recognizes – as must the FCC – that increasing the size and scope of the E-rate program will increase the size of the federal Universal Service Fund. Thus, under the current rules, the burden on customers of funding this program will increase, in an environment where the strain of supporting the federal fund is already increasing.<sup>5</sup> That is why NASUCA urges the Commission – before undertaking expansion of the E-rate program – to first ensure that the broadband programs that will benefit from the new E-rate funding also contribute to the Fund. NASUCA also urges the Commission to make the USF contribution truly competitive, by prohibiting carriers from assessing USF charges on end users. Further, NASUCA urges the Commission to take the step that the current Internet protocol (“IP”) transition demands: Redefining broadband Internet access service as including a telecommunications service, rather than being completely an information service. These more-global issues must be resolved, in order to ensure that the public interest in a vibrant broadband service market will continue to be protected.

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[http://www.whitehouse.gov/sites/default/files/docs/connected\\_fact\\_sheet.pdf](http://www.whitehouse.gov/sites/default/files/docs/connected_fact_sheet.pdf) (last visited July 15, 2013) (ConnectED Fact Sheet).

<sup>4</sup> Id.

<sup>5</sup> See [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-13-1880A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-13-1880A1.pdf).

Within the immediate context of the NPRM, NASUCA notes that, in order to expand the program as the FCC proposes, the Commission must expand reporting requirements to obtain pricing, service quality and actual speed data for the services provided to schools and libraries. The issues that must precede expansion of the E-rate program are, however, of more consequence at this point; thus NASUCA's initial comments on the specifics of the NPRM will be limited and selective. NASUCA reserves the right to address these issues on reply or in subsequent ex parte communications.

## **II. THE FCC SHOULD FUND THE E-RATE PROGRAM BY REQUIRING ALL BROADBAND PROVIDERS TO CONTRIBUTE TO THE UNIVERSAL SERVICE FUND**

In what was essentially a highly-informal twist on “rulemaking,” in late 2012 the Commission “back-pedaled” from proposals to assess broadband service – which would be provided over the facilities newly-funded by the Connect America Fund (“CAF”) – to help pay into the CAF.<sup>6</sup> That was at the then-current level of spending for the former Universal Service Fund (“USF”) and the new CAF. Now the Commission is considering a significant expansion of the E-rate portion of the USF/CAF.

The most-recent USF/CAF contribution level – using the current contribution base – is 15.6%.<sup>7</sup> This was calculated on a contribution base that continued a five-year decline. As NASUCA argued in comments in 2012, the contribution base must be expanded to ensure that the providers who benefit from the USF/CAF also help support

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<sup>6</sup> See <http://thehill.com/blogs/hillicon-valley/technology/248317-fcc-backpedals-from-internet-tax-proposal>.

<sup>7</sup> See <http://www.fcc.gov/document/omd-announces-4th-quarter-contribution-factor-156-percent>.

the funds.<sup>8</sup> The expansion of the contribution base is even more important under the pending proposals for expansion of the E-rate program, which significantly benefits broadband providers.

In any event, funds for e-rate expansion should not come from other USF programs. If there are legitimate savings to be achieved from other parts of the USF – such as high-cost or Lifeline – they should either be used to reduce the USF contribution factor or be pumped back into those programs, by broadening broadband deployment or increasing Lifeline penetration. These savings should not be diverted to E-rate.

### **III. THE FCC SHOULD REVISE ITS RULES AND PROHIBIT CARRIERS FROM ASSESSING AND COLLECTING USF CHARGES ON END USERS**

Line-item surcharges continue to create a number of undesirable effects on competitive markets, and degrade basic consumer protection principles such as truth in advertising. As the USF assessment grows to an increasingly substantial portion of communication bills, there is much less justification for allowing carriers to advertise rates that **exclude** that substantial assessment on the actual bills received by consumers.

Moreover, as more telecom services remain or become free of price regulation, there is no constraint on carriers' ability to adjust their rates to reflect **any** costs, including increased contributions to the USF. If carriers were required to recover USF contributions through ordinary rates rather than surcharges, they would be forced to behave as dictated by the economic circumstances in their competitive markets, which is the most desirable outcome.<sup>9</sup> For example, some carriers may choose to absorb some or

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<sup>8</sup> WC Docket No. 06-122, GN Docket No. 09-51, NASUCA Comments (July 10, 2012) at 4-9.

<sup>9</sup> Imagine if the carriers put a separate line item on their bills for the CEO's salary or lobbying costs. Although the current comments focus on USF surcharges, these arguments would also support elimination of the subscriber line charge ("SLC").

all of an increased contribution factor, in order to maintain competitive prices. However, such efficient and beneficial pricing choices are deterred by rules that allow this substantial portion of cost recovery to remain insulated from competitive market forces.

As long as carriers are allowed to recover USF as a line item, not disclosed at the time of advertisement or sale of services, with the implicit understanding that all carriers are doing the same, the Commission's rules, in essence, allow the removal from competitive forces of literally billions of dollars each year. Carriers have a clear disincentive to absorb any portion of the USF contribution – or to maintain lower rates even as the contribution increases – because such pricing would cede an advantage to the carrier that incorporates the entire contribution into a line-item surcharge while continuing to advertise lower rates. Where core service rates are unconstrained by price regulation, and as USF contributions increase, there is no justification for continuing this practice.

Under current rules, carriers are allowed to misleadingly advertise rates that vary substantially from the actual charges that appear on their bills. Any further increases to the contribution factor, such as increases that result from expansion of the E-Rate program, will exacerbate this misleading consumer practice and allow for an even greater discrepancy between advertised rates and actual rates. It is inherently unfair to require a consumer to enter into a contract without an accurate disclosure of the price that will ultimately be required to be paid.

Even if some, but not all, carriers did choose to absorb or incorporate required USF contributions within advertised prices, but others did not, the resulting confusion in the marketplace would harm competition. It would have the effect of frustrating the

consumer shopping for competitive services because, even after the considerable effort needed to compare advertised prices of competing services in the complex telecommunications marketplace, line-item surcharges such as USF would not be transparent. The consumer will not know whether or not the USF portion of the rate is included in the advertised rate and therefore, the ability of a consumer to make a rational choice would be undercut. Thus the Commission must actually ban USF line items.

Absent a change in the current rules, the Commission can expect carriers to continue to use USF contribution recovery in ways that harm the consumer and the competitive market. For example, before the Commission ordered otherwise and adopted new rules, many carriers actually marked up the actual USF contribution factor and turned it into a profit center by recovering from customers more than the actual required contributions. Although that particular problem was addressed, the current rules continue to allow substantial harm to the marketplace and to consumers as described above. There would be no costs – only substantial savings for consumers – if the Commission were to adopt a rule that simply bans recovery of USF contributions through separate line-item surcharges. It works that way with respect to nearly all other costs, including regulatory costs.

#### **IV. THE FCC MUST DEFINE BROADBAND AND VOIP AS TELECOMMUNICATIONS SERVICES**

NASUCA notes again the FCC's failure to step up and address the classification of broadband and VoIP as a telecommunications service subject to Title II of the Communications Act. As a matter of law, other than for E-rate, the federal Universal Service Fund can be used to support only telecommunications services. The wisest choice for the Commission overall would be to bite the proverbial bullet, and reclassify

(at least part of) broadband service as a telecommunications service, fully eligible for designation as a part of universal service and for support under § 254. On that path, the Commission would not need to engage in questionable interpretations of § 254, or risky assertions of ancillary authority or authority under § 706, or vacuum-creating forbearance.<sup>10</sup>

Statutory provisions regarding what services can receive universal service report are not ambiguous.<sup>11</sup> Specifically, for universal service, including the E-rate, Section 254:

- Focuses on telecommunications **and** advanced services, not on advanced services **instead** of telecommunications services;<sup>12</sup> it contemplates **adding to** the list, not **subtracting from** the list.
- The principles in § 254(b) that include advanced services are only aspirational.<sup>13</sup>
- USF contributions, even for the E-rate, come from telecommunications carriers and services, under § 254(d).<sup>14</sup>

The FCC's failure to address the proper classification of VoIP and Internet access generally has led to inconsistent policies with respect to ensuring that consumers are

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<sup>10</sup> See NASUCA Comments at 34, dated April 18, 2011 *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing a Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link Up*, WC Docket No. 10-90 et. al.

<sup>11</sup> *Id.* at 6-7.

<sup>12</sup> 47 U.S.C. § 254(b)(3): "Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications **and** information services, including interexchange services **and** advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas." (Emphasis added.)

<sup>13</sup> *Qwest Corp. v. FCC*, 258 F.3d 1191, 1199-1200 (10<sup>th</sup> Cir., 2001) ("*Qwest I*"). All of the principles must be considered, but Congress did not dictate how much weight must be given to each principle. *Id.*

<sup>14</sup> 47 U.S.C. § 254(d): "Every **telecommunications carrier** that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." (Emphasis added.)

protected and competition can evolve.<sup>15</sup> The *IP-Enabled Services* docket remains open, but the FCC, to date, has not determined how IP-enabled services or VoIP services should be classified – whether as common carriers under Title II of the Communications Act, or as information service providers. Instead, the FCC has relied on its ancillary authority under Title I of the Communications Act to include VoIP providers in a number of mandates that apply to common carriers, such as those pertaining to provision of 9-1-1 service, CALEA compliance, disabled access, and universal service and Local Number Portability obligations.<sup>16</sup> Although the Commission has managed to shoehorn these essential protections for the VOIP industry using its Title I authority, the FCC’s failure, for many years, to plainly declare the nature of VOIP as a telecommunications service, continues to lead to confusion, unnecessary litigation, and gaps in equal consumer protections deserved by VOIP customers.

Similarly, the Commission must confirm, at least with regard to facilities-based “managed” VoIP providers, that these interconnected VoIP providers are telecommunications carriers.<sup>17</sup> NASUCA reiterates that as the public switch telephone network (“PSTN”) continues to transition to an Internet protocol (“IP”) network, and, as traditional time division multiplexing (“TDM”) services are phased out, it is important for the Commission to confirm that managed VoIP is a telecommunication service -- so that the Commission maintains its direct authority to impose critical statutory provision with regard to those providers. For example, NASUCA is dismayed that the FCC’s Consumer and Governmental Affairs Bureau’s failed to apply the anti-slamming rules to

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<sup>15</sup> See reply comments of Rate Counsel/NASUCA *In the Matter of Numbering Policies for Modern Communications*, WC Docket No. 13-97 at 4-7.

<sup>16</sup> *Id.*, at 4-5, citations omitted.

<sup>17</sup> *Id.*

VoIP.<sup>18</sup>

**V. THE FCC MUST EXPAND REPORTING REQUIREMENTS TO OBTAIN PRICING, SERVICE QUALITY AND ACTUAL SPEED DATA FOR BROADBAND**

NASUCA submits that the accomplishment of the Commission's three stated goals requires that the FCC expand Form 471 reporting requirements to obtain data on pricing, service quality, actual speeds, the type and extent of broadband deployment in schools, the extent that students have access to broadband via smart phones, and tablets, and the extent that students have access to broadband at home through a wired connection. Although the FCC recently modernized FCC Form 477 Data Program in its Report and Order released June 27, 2013,<sup>19</sup> such reforms will not provide the detailed data needed to properly assess which schools have reasonable access to the expanded broadband and which schools do not.

The nation is continuing to experience an unprecedented transition in voice, broadband, and wireless markets.<sup>20</sup> Good information is essential to ensure that the transition yields just and reasonable rates, and quality and availability of essential services in rural and urban markets. As a general proposition, the FCC must have accurate and timely information so that it can undertake data-driven, fact-based decision-

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<sup>18</sup> See *In the Matter of Verizon Complaint Regarding Unauthorized Change of Subscriber's Telecommunications Carrier*, IC No. 11-S3251566, Order released May 31, 2013 (DA 13-1294).

<sup>19</sup> See *In the Matter of Modernizing the FCC Form 477 Data Program*, WC Docket No. 11-10, Report and Order (FCC 13-87) released June 27, 2013. See Initial Comments of the New Jersey Division of Rate Counsel dated March 30, 2011 and the Reply Comments of NASUCA and Rate Counsel dated April 11, 2011.

<sup>20</sup> See *In the Matter of Modernizing the FCC Form 477 Data Program*, WC Docket No. 11-10; *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38; *Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering*, WC Docket No. 08-190; *Review of Wireline Competition Bureau Data Practices*, WC Docket No. 10-132, Notice of Proposed Rulemaking, rel. February 8, 2011 ("NPRM") at para. 22.

making. Furthermore, Rate Counsel concurs with former Commissioner Copps that “[g]athering good data . . . is critical to the FCC’s ability to do its job” and that, furthermore, “ridding ourselves of unneeded data requirements is actually less important than guaranteeing we have the data we need.”<sup>21</sup>

Precisely because the industry continues to be in a state of technical and structural flux, data is essential so that the FCC can monitor progress toward closing gaps in broadband deployment, assess the affordability of broadband service, monitor the quality of voice and broadband services, and evaluate the level of competition that actually exists in relevant markets. Industry members that do not want to provide it may view the information that the FCC collects and reports as irrelevant and “antiquated,” but it is essential to federal and state regulators, state consumer advocates, and other stakeholders, who do not possess the vast resources that the nation’s largest carriers possess. Reliable, timely data improves the efficiency of market transactions and contributes to sound policy making at state and federal levels.

As a result, the FCC should now revise Form 471 to obtain data on deployment, pricing, subscription, and service quality of broadband, in order to target which schools are most need of support from the E-Rate program. The Commission and states would benefit from an expanded and updated data collection practice so that they possess the information necessary to promote universal, high quality voice and broadband services, offered at reasonable prices. NASUCA reiterates that the FCC must collect wireline and wireless broadband deployment data on the services that schools have available to them today.

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<sup>21</sup> / *NPRM*, Concurring Statement of Commissioner Michael J. Copps, at 67.

## **VI. NASUCA COMMENDS THE FCC ON THE THREE GOALS.**

NASUCA agrees that the three goals are in public interest by:

- (1) Ensuring schools and libraries have affordable access to 21<sup>st</sup> Century broadband that supports digital learning;
- (2) Maximizing the cost-effectiveness of E-rate funds; and
- (3) Streamlining the administration of the E-rate program.

Maximizing the cost-effectiveness of E-rate purchases by, inter alia, encouraging increased consortium purchasing; creating bulk buying opportunities; increasing transparency of spending and prices; amending the competitive bidding processes; and encouraging efficient use of funding, is long overdue. Streamlining of the administration of the E-rate program by, among other things, requiring electronic filing of all documents with the E-rate program administrator, the Universal Service Administrative Company (“USAC”); increasing the transparency of USAC’s processes; speeding USAC’s review of E-rate applications; simplifying the eligible services list; finding more efficient ways to disburse E-rate funds; addressing unused E-rate funding; and streamlining the E-rate appeals process, offer the opportunity for more efficient administration with the opportunity to reduce costs.

In order to modernize and reform the E-rate program to deliver affordable access to high capacity broadband, the FCC must first start with reforming data collection, as discussed in the previous section, so sound public policy decisions can be made as to the most effective way to ensure the schools and students who do not currently have access to high capacity broadband are given priority to E-rate funding.

## VII. CONCLUSION

As reported in NECA Washington Watch,

Acting Chairwoman Clyburn spoke at an event hosted by the Annenberg Retreat on September 10, 2013. Clyburn discussed digital learning and the need for faster high-capacity broadband connections in schools. She said there are three key goals in modernizing the E-rate program: connecting every student in America by ensuring affordable access for schools and libraries to high-capacity broadband; maximizing the cost effectiveness of purchases; and ensuring the administrative efficiency of E-rate.

NASUCA commends Acting Chairwoman Clyburn's support for the three goals in the NPRM, and also supports them. But there is another key goal beyond administrative efficiency: Ensuring that the burden of paying for the expanded E-rate program is spread equitably among competitors and their consumers. And, again, broadband Internet access services should be (properly) reclassified as telecommunications services.

Respectfully submitted,

Charles Acquard, Executive Director  
NASUCA  
8380 Colesville Road, Suite 101  
Silver Spring, MD 20910  
Telephone (301) 589-6313  
Fax (301) 589-6380

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