

**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)

To: The Commission

COMMENTS OF PHILIP B. GIESELER

September 16, 2013

Philip B. Gieseler
Williamsburg, VA
pgieseler@gmail.com

EXECUTIVE SUMMARY

The objectives of E-rate are commendable. As the Commission recognizes, the implementation needs substantial overhaul. Careful analysis reveals that wise determinations were made when E-rate was initiated in 1997. However a single incorrect decision is at the root of both E-rate's inequitable distribution of funds and E-rate's enormous complexity, namely that applicant's should not have any limit on the funds requested. This one decision, if modified, opens the door to:

- An equitable distribution of funds
- A return to important core concepts
- A significantly simplified program

Several parties have been advocating this change since 2003. It is now time for the Commission to act, to make E-rate a shining example of government at its best not only in its noble objectives but in its administration. The body of these comments elaborates on these points and provides a pathway for change through an "E-rate Fast Track."

TABLE OF CONTENTS

Introduction—the goals of E-rate	4
E-rate improvements must be comprehensive and proactive	7
The Commission must consider basic economic principles in designing an improved system	8
The Commission’s 1997 core concepts should be reaffirmed	9
Potential changes to the unlimited per-applicant funding model	12
Adherence to the unlimited funding model has eroded E-rate’s original core concepts.....	14
A per-applicant funding cap.....	16
An “E-rate Fast Track” is a means to transition to an improved system	19
Program compliance will be significantly improved with the new system	24
Conclusion.....	26

**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)

To: The Commission

COMMENTS OF PHILIP B. GIESELER

Philip B. Gieseler is a technology consultant providing services to public policy firms. He has past work experience at the Federal Communications Commission, the Universal Service Administrative Company, and in private industry. The views expressed in these comments are his own.

Introduction—the goals of E-rate

The Commission is seeking fundamental improvements and modernization to the E-rate program.¹ In 2005 the Commission instituted a wide-ranging evaluation of universal service, including consideration of performance standards by the Administrator.² In 2010 it forwarded to Congress a National

¹ Notice of Proposed Rulemaking in WC Docket 13-184, adopted July 19, 2013, released July 23, 2013, FCC 13-100, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0723/FCC-13-100A1.pdf (hereinafter “Notice”).

² See Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking in WC Docket No. 05-195, CC Docket No. 96-45, CC Docket No. 02-6, WC Docket No. 02-60, WC Docket No. 03-109, and CC Docket No. 97-21, adopted June 9, 2005, released June 14, 2005 (FCC 05-124) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-124A1.pdf

Broadband Plan in which changes to E-rate were key components.³ Many other initiatives have taken place. Yet, despite these efforts and others, and over fifteen years of experience, E-rate continues to be slow, inequitable, vague, and overly bureaucratic. Commendably, the Commission appears ready to take substantial steps to correct the fundamental underlying issues with E-rate.

The Commission is suggesting three goals for modernizing E-rate. In summary, these goals will:

- Emphasize the deployment of broadband technologies
- Establish revised methods so that limited E-rate funds are used in more cost effective ways
- Improve the administration of the program.

We believe that Commission priority can be focused on the latter two goals. Schools and libraries do not need to be convinced that broadband services are increasingly important for their missions. At the same time, E-rate beneficiaries continue to utilize a variety of communication technologies beyond just broadband, for valid reasons.

Further, as a fundamental premise, we suggest that a moderate position regarding the level of government intervention will be the most effective. By this is meant that our national government has a legitimate role in advancing the educational opportunities available to our population in this Information Age. Local organizations are in the best position to determine the specific methods and technologies that will achieve this critical national objective. By outlining the framework for technology assistance while allowing flexible solutions for the

³ Federal Communications Commission, *Connecting America: The National Broadband Plan*, (National Broadband Plan), available at <http://www.broadband.gov/download-plan>.

many diverse parts of this nation, the Commission will be striking an appropriate balance between unlimited discretion and regulatory overkill. As will be described, Commission precedent establishes strong support for this point of view.

We also hold a second fundamental premise, namely that regulatory simplicity is better than complexity. Compliance with program requirements is difficult to obtain if those program requirements are complex and vague. A simplified structure will provide for much greater program compliance.

The Commission's latter two goals can be restated in the following way:

Funding must be equitable. The lack of funding equity has been widely recognized as a flaw in the current program. The Commission recognizes this, and several options are under consideration.

E-rate administration must be driven by maximum customer service. Excellent customer service means that rules, policies, and administration are simple, clear, prompt, and fair. This is not the case today.

To best accomplish these goals we urge (in the words of some advocates) a true "reboot" of E-rate. Individual additions, subtractions, or modifications to the current rules will not be as far-reaching and effective as a higher level, strategic review. A zero-base analysis would consider every facet of the program. Past lessons learned can help design a fresh start, and then the feasibility of transitioning to this improved structure can be evaluated.

In the next sections, we outline why Commission actions to date may have been less effective than desired and discuss "regulatory incentive structure." A further section outlines original "core concepts" that the Commission wisely

adopted in 1997, but that have been compromised over time. This is followed by a discussion of the one incorrect assumption that was made in the original conception of E-rate—that a fund of \$2.25 billion would be sufficient for the program that was adopted—and how adherence to the resulting conclusion for unlimited per-applicant funding has created the majority of complexities and problems.

We then provide a conceptual model for an “E-rate Fast Track,” a new system that can achieve the equity and program simplification needed for the 21st century. Prior to concluding remarks we outline the positive impact of a simplified system on the Commission’s program compliance efforts.

E-rate improvements must be comprehensive and proactive

The reason that past Commission improvement efforts have not been fully successful is that those efforts have largely been reactions to E-rate complexities rather than solutions to those complexities. Today, even the top experts inside and outside of government cannot say they fully understand the details of E-rate. The original objectives have been subsumed by the myriad, complex program details.

Two examples illustrate why past attempts at improving E-rate have fallen short. First is the Commission’s Bishop Perry decision.⁴ This landmark determination allowed applicants to correct minor mistakes that previously would have led to denial. The second example is a program initiated by the

⁴ Order in CC Docket 02-6, adopted May 2, 2006, released May 19, 2006, FCC 06-54, available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-06-54A1.pdf.

Administrator called Helping Applicants to Succeed (HATS).⁵ Applicants who have been consistently denied funding can receive special counseling by Administrator representatives so that future funding requests will meet all requirements and be funded. In both cases, as important and useful as these actions have been, they only treat the symptom of inordinate complexity rather than correcting the underlying problem.

Thus, the many thoughtful suggestions and proposals in the Notice of Proposed Rulemaking should be evaluated by whether they “react” to problems or “solve” problems.

The Commission must consider basic economic principles in designing an improved system

The purpose of a government subsidy program such as E-rate is to encourage behaviors that have social utility. Ideally, regulations are geared to partner with the incentives of the population served. Today’s E-rate is not well-designed in this respect.

Under the current approach, the natural incentive is for applicants to take advantage of their funding opportunity to the maximum degree possible. Those at the front of the line, in correctly following the incentive that the Commission has provided, leave insufficient funds for those behind.

Applicants behave rationally in following the incentives that the Commission provides. Unlimited free money coupled with a pecking order is

⁵ See “Helping Applicants to Succeed (HATS),” available at <http://usac.org/sl/about/outreach/hats.aspx>.

contrary to an equitable system. In designing improvements to E-rate, the Commission must actively consider the incentive structure that its regulations create, and put into place an improved structure that will fully align with the public interest objectives it is seeking.

An improved regulatory model will marry the incentives of applicants with the objectives of the Commission. After this fundamental model is determined, further program details and policies can be established. If the best regulatory model is developed—one that encourages even more cost effective choices and provides equitable funding—then the level of program complexity can be substantially decreased. Applicants will act naturally toward program goals and will need less restrictions and oversight.

The Commission's 1997 core concepts should be reaffirmed

Design of a new and improved system is less difficult than it might otherwise seem, for we have a sound body of knowledge in the 1997 Report and Order that established E-rate.⁶ Three interrelated concepts were wisely incorporated into that Order.

- Technological Neutrality
- Applicant Choice
- Broad Eligibility Standards

With hindsight, we now know that a fourth idea—that no per-applicant funding limits were necessary—was based on an incorrect assumption. Building on the

⁶ See Report and Order in CC Docket 96-45, adopted May 7, 1997, released May 8, 1997, FCC 97-157, (hereinafter “97 Order”) available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-97-157A1.pdf.

three correct core concepts and improving on the incorrect determination provides a foundation for a vastly improved program.

Technological Neutrality. The Commission found that comparable technologies should be able to obtain comparable treatment. In administering this principle, for example, E-rate has provided support for telephone service, whether provided by POTS, T-1, Centrex, cellular, or interconnected Voice over IP.

By following the principle of technological neutrality, we will avoid limiting providers of universal service to modes of delivering that service that are obsolete or not cost effective.⁷

Thus the marketplace would determine technology winners and losers, not centralized government preferences.

Applicant Choice. The Commission also found that applicants, and not the Commission, should be the ones that select the communication technology solutions that they find to be best.

This program provides schools and libraries with the maximum flexibility to purchase the package of services they believe will meet their communications needs most effectively.⁸

The Commission made this determination because:

[T]he establishment of a single set of priorities for all schools and libraries would substitute our judgment for that of individual school administrators throughout the nation, preventing some schools and libraries from using the services that they find to be the most efficient and effective means for providing the educational applications they seek to secure.⁹

⁷ *Ibid*, paragraph 49.

⁸ *Ibid*, paragraph 29, emphasis added.

⁹ *Ibid*, paragraph 432, footnote omitted.

Under the principle of Applicant Choice, differing priorities in different geographic areas would be efficiently addressed, not by limitations to all, but by allowing individual applicants to make their own determinations of how to most efficiently implement communication services.

Eligibility Standards. A third core concept is not explicitly stated in the '97 Order, but is inherent in the language regarding what products and services would be eligible for E-rate funding. The Commission laid out broad criteria for eligibility, and did not make highly specific determinations beyond some illustrative examples of what technologies could be funded. This original specification was straightforward. Funding would be provided for:

- Any commercially available telecommunications service
- Basic conduit access to the Internet
- Internal connections that were an “essential element” and “necessary” for the transport of information.¹⁰

To provide helpful guidance to applicants and service providers, an Eligible Services List was developed by the Administrator. This document provided specific examples of what could be funded based on FCC policies. For example, the Eligible Services List issued November 16, 2000 indicated that a router was eligible and indicated that this conclusion was supported by Paragraph 460 of the '97 Order.¹¹

The Eligible Services List was not a policy document itself but rather a tool that assisted in the administration of FCC policy. New and better technologies

¹⁰ *Ibid*, paragraphs 431, 436, and 459 respectively.

¹¹ See Eligible Services List dated November 16, 2000, available at http://usac.org/res/documents/sl/pdf/ESL_archive/EligibleServicesList_111600.pdf

were eligible for funding so long as they were consistent with the Commission's broad statements that defined eligibility.

Unlimited Per-applicant Funding. A further decision in the '97 Order was that applicants could apply for whatever level of funding they desired, with no limit on the maximum amount requested. The Commission considered but rejected a suggestion for a per-institution cap, finding that "educational institutions' funding needs will vary greatly" and "[w]e are not aware of any practical way to make fair and equitable adjustments for such varying needs."¹² The original thinking was that a fund of \$2.25 billion per year of support would be sufficient for the needs of schools and libraries. Under the program that was implemented, this assumption has been found to be wildly incorrect.

Potential changes to the unlimited per-applicant funding model

The outcome of the Commission's decision to allow unlimited funding to each applicant has had many undesirable results, most obviously a lack of funds for deserving applicants that are not first in line. For this reason, the idea of some type of per-applicant cap has been consistently recommended as a solution to the problems with E-rate. In 2003 the Waste, Fraud, and Abuse Task Force recommended that such a ceiling be created:

A ceiling would limit those applications that appear to be seeking disproportionately large funding requests. It is believed that this, along with other Task Force recommendations, would help ensure that applicants are submitting the most cost-effective funding requests. Further, a formula that produces a modest reduction in such requests is likely to promote greater competition in the

¹² '97 Order, paragraph 538.

program as a whole by expanding the base of applicants that could qualify for Priority Two support.¹³

More recently, in 2010, the Commission issued a Notice of Proposed Rulemaking that was associated with its National Broadband Plan. The Notice suggested that Internal Connections funding could be based on a per student cap per school district. The Commission stated:

We believe that these options for reforming how we fund internal connections could have several advantages over our current rules. First, the current discount matrix and rules of priority have the effect of providing funding to a limited number of school districts that have the very highest percentage of students eligible for free or reduced price school lunch, while providing nothing to other districts that are significantly impoverished. Second, many stakeholders have expressed a desire for a more predictable funding mechanism whereby schools and libraries would know on a yearly basis how much funding they will receive for internal connections. This predictability is essential so that schools and libraries can better plan for their future technological needs.¹⁴

The E-rate consulting firm Funds for Learning has provided substantial support for a per-applicant cap.¹⁵ Commissioner Ajit Pai has recommended a cap on funds that an applicant can receive.¹⁶ The Commission appears to be actively considering some type of per-applicant cap in the Notice, along with

¹³ *Recommendations of the Task Force on the Prevention of Waste, Fraud and Abuse*, September 22, 2003, page 5, available at <http://apps.fcc.gov/ecfs/document/view?id=6515291558>.

¹⁴ See Notice of Proposed Rulemaking, CC Docket 02-6, GN Docket 09-51, adopted and released May 20, 2010, FCC 10-83, paragraphs 69-70, available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-10-83A1.pdf.

¹⁵ See The Funds for Learning E-rate 2.0 Proposal, June 14, 2003, available at <http://apps.fcc.gov/ecfs/document/view?id=7022426143>.

¹⁶ Remarks of Commissioner Ajit Pai “Connecting the American Classroom: A Student-Centered E-rate Program,” a speech delivered at the American Enterprise Institute, Washington, DC, July 16, 2013, available at <http://www.fcc.gov/document/commissioner-pai-speech-student-centered-e-rate-program>.

related changes that would align the incentives of applicants with the policy objectives of the Commission.

Adherence to the unlimited funding model has eroded E-rate's original core concepts

Over time, due to allegiance to the decision to allow unlimited per-applicant funding, the Commission's core concepts have been seriously eroded. Recent policy decisions by Commission staff have not been able to be fully objective. Each one typically begins with the question "What is the impact on the funding cap?" rather than "How does your idea align with E-rate's policy objective?"¹⁷

Current and potential E-rate rules depart from the concept of Technological Neutrality. Due to the Priority1/Priority2 system, technology from outside of applicant grounds (such as a voicemail service) can receive support, whereas funding for comparable technology within those grounds (such as an in-house voicemail system) is not available to most applicants. So applicants are inclined to seek a fundable Priority 1 services even if a similar non-fundable Priority 2 architecture would be more cost effective.¹⁸

¹⁷ For example, intrusion protection is a newer technology highly similar to an eligible firewall, but the Commission declined to add intrusion protection to the Eligible Services List, finding that "protection from unauthorized access is a legitimate concern" but "the funds available to support the E-rate program are constrained." See Sixth Report and Order in CC Docket 02-6 and GN Docket 09-51, adopted September 23, 2010, released September 28, 2010, FCC 10-175. available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-10-175A1.pdf.

¹⁸ Off-site services tend to use a "big pipe" network architecture that requires one or more high bandwidth links. A smaller pipe coupled with in-house components (for voice mail, e-mail, caching, and video) can be more cost effective. Individual applicants are in the best position to determine the best architecture for their requirements, but their evaluation is improperly influenced by disparate availability of E-rate funds.

Additionally, the Commission is evaluating whether to remove E-rate support for legacy phone services. Under the concept of technological neutrality, if any voice services are eligible for support, then the marketplace rather than the Commission would make the determinations for which voice technologies best serve applicant needs.

Current and potential rules also depart from the concept of Applicant Choice. The Commission is considering withdrawing support from technologies that it has concluded do not serve a sufficient educational purpose, such as paging and e-mail. However, under the concept of Applicant Choice, applicants are empowered to make their own best decisions for obtaining their educational objectives. Applicants do not need to be forced to obtain E-rate objectives; they need to be allowed and encouraged to achieve them in the best way.

Current and potential rules likewise depart from broad eligibility standards. The Eligible Services List has become its own policy document, with its highly detailed specifications becoming senior to the original, broad FCC eligibility statements. This level of detail, coupled with ever-changing technology, has resulted in limitations and inconsistencies that are unnecessary and confusing when viewed against the original objectives of the program.

For example, E-rate will help pay for a battery backup system, but will not pay for a less expensive (and oftentimes sufficient) surge protector. Network management and anti-virus protection—both essential components in modern systems—are not eligible, but can be funded if included with a priority 1 service.

Many such examples illustrate erosion of the Commission's core concepts. The current regulatory model has been skewing the choices that applicants make, contrary to its concepts of Applicant Choice and Technological Neutrality and through an Eligible Services List that puts the Commission into the weeds of technology determinations rather than at a more elevated and objective level.

A per-applicant funding cap

The original noble concepts behind E-rate have little resemblance to the complexities and inequities of today. A fundamental decision facing the Commission is whether to continue with an inefficient regulatory model that sacrifices core concepts and creates significant complexities, or whether to implement an improved structure with per-applicant funding limits.

We advocate a fresh look based on the correct, original core concepts, with a modification of the incorrect "unlimited funding" idea. Specifically, the way to obtain a proper incentive structure is to put into place some type of per-applicant, per-location, or per-student limit.¹⁹ If this and other similar changes are made, virtually every other complication with today's E-rate could be vastly simplified.

- Applicants would have the incentive to use limited funds even more wisely.

¹⁹ The recommendation for a "per-applicant" limit when used in these comments should be interpreted in a broad sense to apply to the several changes under consideration by the Commission for spreading limited E-rate funds in the most equitable way. This includes a decrease in the maximum discount rate as a component part of the improved structure.

- Applicants would be able to make the technology choices that they, not some centralized government entity, finds to be best for their needs and hence will better advance the objectives of the program in a more cost effective way.
- Under any reasonable formula that the Commission would develop, funding would be substantially more equitable than the unfair system that exists today.
- Furthermore, some type of per-applicant funding limit would allow for elimination of most E-rate's complexities, which when evaluated turn out to be largely a product of the unlimited funding formula now in place.²⁰

Attempts to narrow eligibility, as is being considered by the Commission, will not fix the problems with E-rate, but instead will even further improperly diminish applicants' capability to select the best solutions for their needs. Flexibility that comes from broad eligibility standards is entirely feasible if coupled with a per-applicant cap that provides the incentive to be particularly cost effective. Applicants will be able to choose the latest and best infrastructure solutions, without one-size-fits-all limitations.

Two arguments may exist in opposition to a per-applicant cap. First, creation of a formula that would be equitable for E-rate constituents might be difficult. This may be correct, but is not a legitimate complaint given the extreme lack of equity that now exists. The benefits of such an effort are more than worth the resources and effort required.

When Commissioner Pai quoted John F. Kennedy in connection with E-rate he was exactly right.

²⁰ Similarly, both the Priority 1/Priority 2 system and the E-rate filing window were not a part of E-rate's original conception, but were added in reaction to the dollar limits of the fund in comparison to dollar requested. Under a full review, the value of these modifications can be freshly evaluated.

[W]e should answer yes to each of these questions [about E-rate], "not because they are easy, but because they are hard," because the goal of linking technology and education "will serve to organize and measure the best of our energies and skills, because that challenge is one that we are willing to accept, one we are unwilling to postpone, and one which we intend to win." When it comes to our children's education, we should not be afraid of the hard choices. We should not tinker around the edges. We should shoot for the moon. And we should aim to win.²¹

The agency responsible for communications policy in the world's strongest country most certainly has the wherewithal to evaluate and develop an appropriate per-applicant funding system.²² Creating an appropriate cost model is easily worth the effort given the resulting benefits.²³

The second possible objection, though potentially stated in different terms, could be that a simplified, more equitable funding model might adversely affect the advantages and the influence of some constituents. Those applicants who have benefitted disproportionately to E-rate may feel they would be net losers

²¹ Statement of Commissioner Ajit Pai re: Modernizing the E-rate Program for Schools and Libraries, WC Docket No. 13-184, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0723/FCC-13-100A4.pdf.

²² The Commission's Office of Strategic Planning provides economic and other expertise, and may be well suited to this task.

Office of Strategic Planning and Policy Analysis works with the Chairman, Commissioners, Bureaus, and Offices to develop strategic plans, identify agency's policy objectives, and provide research, advice, and analysis of advanced, novel, and non-traditional communications issues.

See <http://www.fcc.gov/bureaus-offices>.

²³ Whereas the cost of hardware and software is reasonably consistent throughout the country, the cost of broadband links can vary. Economic modeling for a per-applicant formula could take this into account. A side benefit of an improved system is that it can be designed to provide improved statistics about the varying costs available in diverse geographic regions. Deployment information is already available. See for example High-Speed Services for Internet Access: Status as of December 31, 2008, a report by the Industry Analysis and Technology Division of the Wireline Competition Bureau, February 2010, available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-10-129A7.pdf. See also Sixth Broadband Deployment Report in GN docket 09-137 and GN Docket 09-51, adopted July 16, 2010, released July 20, 2010, FCC 10-129, available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-10-129A1.pdf. The latter report concluded that between 14 and 24 million Americans do not have access to broadband services (approximately 6 percent of the U.S. population).

under a revised approach, but this is not necessarily the case. As the Commission previously has concluded:

[S]chools and libraries at the highest discount levels could receive significantly less funding if we were to establish a capped amount than they receive under the current rules. However, in the near future, as demand for priority one services grows, it is likely that, absent changes to the current funding structure, there will be no funding available for internal connections for even the highest-discount applicants.²⁴

That is, under a per-applicant cap, all applicants would receive a formula-based amount that could be used with greater flexibility, rather than no applicant being able to receive any Internal Connection funding.

Additionally, some parties may benefit from the enormous complexity of E-rate, either through job security or consulting revenue. Despite possible disadvantages to a limited few, the Commission must evaluate the changes necessary to meet the overall public interest.

A positive decision by the Commission regarding some type of per-applicant funding limit is fundamental to the future of E-rate. If a set of improvements of this type is not accomplished, E-rate will be destined to continue to as needlessly complex program that imperfectly fulfills its mandate.

An “E-rate Fast Track” is a means to transition to an improved system

E-rate has had years of highly detailed Commission precedent that would be confusing and unnecessary in a new system. These prior decisions in some

²⁴ See Notice of Proposed Rulemaking, CC Docket 02-6, GN Docket 09-51, adopted and released May 20, 2010, FCC 10-83, paragraph 73, available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-10-83A1.pdf.

cases provide details beyond the understanding of most applicants, and in other cases leave details unresolved.²⁵ For this reason, the Commission's deliberations should result in the creation of a new system that draws from lesson learned but that is separate from past precedent. This new system would emphasize simplicity, and would return to original high-level E-rate objectives.

To implement this improved approach, an E-RATE FAST TRACK should be adopted. Participants in the Fast Track would be provided much greater simplicity, faster funding decisions, and improved program administration in exchange for accepting a per-applicant funding limit based on a formula to be developed by Commission experts.

The Fast Track might operate alongside traditional E-rate as a transition strategy, with the legacy, cumbersome system eventually discarded. To be feasible, the Fast Track would need a majority of current E-rate funds devoted to it, with limited funds available in the legacy system for less typical requirements during the transition period.²⁶

One important issue under consideration by the Commission is how to address the high costs associated with infrastructure buildout. Such costs were not originally anticipated by the Commission as a part of E-rate but have been funded within the program since 1999.²⁷

²⁵ Two representative examples involve lack of clarity in the Commission's Lowest Corresponding Price provisions and whether free handsets can be provided as a part of an eligible telephone service.

²⁶ The legacy system would also have changes suggested in the Notice of Proposed Rulemaking, such as a reduction in the maximum discount rate.

²⁷ The Commission has stated that "[w]hen we started this program, we did not envision providing support to fund significantly the backbone of a provider's network." See the Commission's

Our observation is that E-rate must be viewed in the context of the even broader priority of universal broadband for all citizens.²⁸ In order to preserve limited E-rate funds for their original purpose, infrastructure buildout should be funded through separate initiatives, perhaps High Cost, continuation of BTOP²⁹, or separate universal service funding.

Infrastructure buildout is extremely important for universal service goals, even beyond the needs of E-rate. If buildout of fiber, wireless, or other technology is accomplished outside of funding for schools, then the benefits will be available to the public at large, and not only for a K-12 “educational purpose.”³⁰ Additionally, if buildout costs are funded separately, more funds will be available for core E-rate purposes.

“Tennessee” decision at paragraph 42, available at http://transition.fcc.gov/Bureaus/Common_Carrier/Orders/1999/fcc99216.txt. The Commission later determined that up-front infrastructure buildout costs of \$12.6 million would have to be amortized over a period of at least three years. See the Commission’s “Brooklyn” Order at paragraph 20, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-00-354A1.pdf. (Commissioner Harold Furchtgott-Roth dissented from that decision, finding that “it is improper to use universal service funds to subsidize the installation of a service provider’s Internet backbone.”) USAC’s current approach is to require amortization of up-front infrastructure costs of \$500,000 or more. Under current rules, E-rate will pay for eligible infrastructure buildout costs of any amount, without limit, though amortization of the amount over at least three years is required. See the USAC document “Wide Area Networks (WANs)”, available at <http://www.usac.org/sl/applicants/beforeyoubegin/eligible-services/wan.aspx>.

²⁸ See Joint Statement on Broadband in GN Docket 10-66, adopted and released on March 16, 2010, FCC 10-42, available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-10-42A1.pdf.

²⁹ The Broadband Technology Opportunities Program (BTOP) stems from a one-time allocation of \$7.2 billion to expand access to broadband services. See <http://www2.ntia.doc.gov>.

³⁰ An additional implementation consideration would be to better recognize the key role of libraries in serving all members of the public. The E-rate funds of libraries are not legislatively restricted to K-12 education.

The Fast Track could be developed based on the following conceptual outline.³¹

- Performance Standards for the Administrator would be established first, and then program details are incorporated that are sufficiently straightforward so that those Performance Standards can be met. This is a reversal of the normal sequence in order to put the emphasis on customer service.
 - 95% of all funding requests are decided by the start of the July 1 funding year
 - 100% of all funding requests are decided by September 30.
 - Three funding decisions are available: Approved, Denied, or Cannot Approve (based on information currently available). The third decision type can be appealed, but both the Administrator and applicants will have an incentive to obtain or provide any additional necessary information to avoid this result.

Coupled with similar performance standards for resolving appeals, this approach will eliminate the Administrator's infamous "Black Hole" where funding requests are held without action and without relevant communication for months or years.

- All funding requests are submitted online. Any applicant not wanting to submit using the online system could hire an outside agency to provide the necessary data input.
- Funding requests are considered on a first-come, first-served basis in order to encourage applicants to submit funding requests early. This approach will speed up funding decision by decreasing the last-minute flurry of requests at the close of the current filing window.
- A simplified set of eligible products and services would be established, based on a high level specification that recognizes the need for Technological Neutrality and Applicant Choice. Applicants will be empowered to make the communication technology selections (consistent

³¹ For ease of presentation the Fast Track system is being described with two assumptions. First, we assume that a specific funding year continues to exist (though no particular assumption is made for a specific filing window). Second, we use the term "Form 471" as the means by which applicants submit funding requests. These assumptions are not essential to the Fast Track system.

with program objectives) that they, the applicants, find to best serve their needs.³²

- The calculation of an applicant's discount level and/or per-applicant funding limit would be determined separately from the E-rate funding request form, through an online system that would be maintained throughout the year. Applicants will have certainty over their level of qualification for funding well prior to submission of the Form 471.
- What is now a free-form Item 21 Attachment that must be manually reviewed would be replaced by drop down boxes that are provided within the Form 471. Computer review of this information would significantly improve processing efficiency.³³
- Administrator processes would be geared toward excellent customer service. Unnecessary roadblocks (such as the Administrator's refusal to speak with the applicant's service provider about a funding request) would be eliminated.
- The current priority system—Priority 1 and Priority 2—would be eliminated so that applicants have maximum flexibility. Priorities are no longer required with a per-applicant funding limit, and were added to E-rate only because, with no per-applicant limit, funds requested were exceeding funds available.³⁴

³² A starting point for developing a high level specification of eligible products and services would be the "Functions" that are a part of the current Eligible Services List and the Administrator's Eligible Products Database (EPD). (The Eligible Products Database is described at <http://usac.org/res/documents/sl/pdf/tools/EPDatabase-FAQs-Instructions.pdf>.) The Commission is proposing to terminate the EPD program. See *Notice* at paragraph 198. However, the concept behind the EPD—that components can be essentially pre-approved as eligible and do not necessarily require intensive individual review in funding requests—is critically important for efficient administration of E-rate.

³³ The current review process calls for highly individualized analysis beyond evaluating whether a product or service is included in the Eligible Services List. The review also evaluates whether the components are being used for an "eligible purpose." However, under this new system, an eligible technology provided to or on applicant grounds would be presumed to be serving an eligible purpose. If deemed necessary by the Commission, the technology solution could be required to "principally" serve the needs of students/teachers or library patrons. However, this latter limitation adds to review complexity and may be unnecessary as it assumes that applicants do not have a natural incentive to provide the best technology solutions for their educational missions.

³⁴ See Fifth Order on Reconsideration and Fourth Report and Order in cc Docket 96-45, adopted June 12, 1998, released June 22, 1998, FCC 98-120, paragraphs 34-36, available at http://transition.fcc.gov/Bureaus/Common_Carrier/Orders/1998/fcc98120.pdf. The "filing window" was also an addition to the original conception of E-rate, and might not be necessary in a modernized system.

Similar consideration for improved customer service would be applied to other processes. For example:

- Initial appeals of adverse funding decisions would be accomplished by an entity fully separate from the Administrator who made the initial determination in order to achieve additional transparency and objectivity. These appeals and their decisions would be made publicly available, as well as statistical performance reports. (Because E-rate would be simplified, the number of appeals would be expected to drop and the appeal review process would become more straightforward.)
- The invoicing and disbursement process would be simplified through online processes. Online forms would automatically provide the set of products and service previously approved so that applicants and service providers could specify which line items are ready for payment.³⁵ The Administrator would not request information already submitted or ask for information from service providers that service providers do not have.
- Online information for each location or applicant would include a listing of products purchased over the past five years and a listing of services currently being obtained. This will allow the FCC and the public to readily see how each applicant is utilizing E-rate funds.
- Every current process of the Administrator would be evaluated with an eye toward eliminating review steps that are no longer necessary under a simplified system.

Program compliance will be significantly improved with the new system

Program compliance is an essential part of the E-rate program, but regulation on top of regulation is not the way to achieve it. Complex rules and procedures create program compliance problems. A per-applicant funding cap, coupled with a simplified application process, provides the right incentive and ability for applicants to comply with FCC rules.

³⁵ Current invoice forms do not request details for what the invoice covers. USAC often will request additional documentation, which can delay and complicate the invoice process.

Here is but one illustration. In 2001 a Texas school district requested \$24 million in funding for maintenance of its Internal Connections components. This amount was far in excess of any prior maintenance request by any applicant, but was routinely approved by the Administrator under its current procedures that did not have any dollar limit on the amount of funds an individual applicant could request. Eventually, questions were raised by outside parties whether such a large request was appropriate, even leading to Congressional hearings in which USAC, the FCC, the applicant, and the service provider were involved. Although these events took place many years ago, the question of whether the funding was appropriate under then-current procedures remains unresolved today.

Now compare those events to a scenario in which a per-applicant funding limit is in place. The applicant would only receive funding up to a certain pre-defined limit, and would have an incentive to use those limited funds in a highly cost effective way. They would be able to use the funds for maintenance if they wished, unlike a Commission suggestion in the NPRM that anticipates withdrawing funding for maintenance needs.³⁶ Program simplification and improved incentives would provide for improved compliance.

Many other complications are eliminated with this approach. Technology Plans that require paperwork but don't require true planning can be fully eliminated. (Applicants already have the incentive and requirement to plan.) Service substitutions can be machine-processed and approved immediately.

³⁶ Under the concept of Applicant Choice, the Commission should not be restricting the use of E-rate funds to, for example, purchase of new equipment, when applicants may find that maintenance of existing equipment is more cost effective.

Often-misunderstood rules for “duplicative services” will not be needed, because applicants will want to use limited funds only for necessary components. Current reviews for “cost effectiveness” can be significantly decreased because applicants have additional incentive to select cost effective solutions.³⁷

Applicants will have significant certainty at the point they submit funding requests that the requests will be approved and will understand the amount of that approval. Important competitive bidding requirements will be better aligned with the economic marketplace. Transparency will be facilitated through the publicly-available online system.

Conclusion

All of these benefits can be a natural result that stems from a change in the current regulatory framework—an alignment of applicant incentive structure with Commission objectives. Some type of per-applicant funding limit and associated changes have merit in their own right as a way to obtain funding equity among all constituents, and have exponential benefits in opening the way for fundamental program simplification.

³⁷ Current Commission guidance for cost effectiveness is that “a proposal to sell routers at prices two or three times greater than the prices available from commercial vendors would not be cost effective, absent extenuating circumstances.” See Order, adopted December 4, 2003, released December 8, 2003, FCC 03-313 (“Ysleta Decision”), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-03-313A1.pdf. This guidance provides no effective criteria for determining whether a funding request is actually cost effective, and illustrates that incentives and simplifications can be a better approach for an improved E-rate system as opposed to ever-greater government regulation that is not able to provide effective bright lines.

We ask that the Commission carefully evaluate all the proposals and comments before it, and then make policy choices based on a true solution for the difficulties faced by E-rate—a regulatory structure that provides:

- Simplicity
- Efficiency
- Clarity
- Equity
- Sunshine
- Program Integrity
- Improved Management

We know of no other approach beyond a correct regulatory incentive structure that will provide the same level of effectiveness in realizing the important policy objectives of this program.

Respectfully submitted,

Philip B. Gieseler
Williamsburg, VA
pgieseler@gmail.com
September 16, 2013