

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

In the Matter of

Modernizing the E-rate Program for Schools  
and Libraries

WC Docket No. 13-184

Schools and Libraries Universal Service  
Support Mechanism

CC Docket No. 02-6

A National Broadband Plan for Our Future

GN Docket No. 09-51

Public Notice, “Wireline Competition Bureau  
Seeks Comment on Draft Eligible Services List  
for Schools and Libraries Universal Service  
Program”

DA 14-1130

**Comments of Affiniti LLC**

Affiniti LLC (“Affiniti”) hereby submits these comments in response to the Public Notice<sup>1</sup> issued by the Wireline Competition Bureau (“Bureau”) in the above-captioned proceeding seeking comment on the draft Eligible Services List (“Draft ESL”) to govern the schools and libraries universal service support mechanism (“E-rate”) for funding year 2015.

Affiniti offers these comments as an experienced provider of E-rate-eligible services to schools and libraries, with a detailed understanding of the needs both of services providers participating in E-rate, and the schools and libraries they serve. Affiniti provides Wide Area Networking (“WAN”), Voice over IP Telephony (VoIP), Dedicated Internet Access and Managed Services to public and private customers in 19 states. Affiniti delivers advanced broadband solutions to nearly one million students at over 1,000 education sites, as well as 45 healthcare institutions, and other Community Anchor Institutions (“CAIs”).

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<sup>1</sup> *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Public Notice, “Wireline Competition Bureau Seeks Comment on Draft Eligible Services List for Schools and Libraries Universal Service Program,” DA 14-1130 (rel. August 4, 2014) (“Public Notice”).

## Discussion

In the *E-rate Modernization Order*, the Commission confirmed its goal to make E-rate processes “fast, simple, and efficient.”<sup>2</sup> Affiniti supports this goal, and agrees with the Commission that it is a vital step in maximizing the benefits of the E-rate mechanism to the students, teachers, community members, and school and library administrators that are its intended beneficiaries.<sup>3</sup> To achieve this goal, it is important for the Commission to offer clear, easy-to-apply guidance as to the eligibility of the various equipment and services that applicants may need. The Draft ESL for funding year 2015, accordingly, has been dramatically streamlined and shortened, from 49 pages in funding year 2014 to a proposed six pages for funding year 2015.

### **A. Clarity, not Brevity, Begets Speed, Simplicity, and Efficiency**

Affiniti supports the Commission’s pursuit of fast, simple, and efficient E-rate processes. Among the most helpful things the Commission could do for E-rate applicants and service providers would be to build on the ESL to create a genuinely clear and comprehensive guide to both the procedural and substantive requirements of the program. Streamlining of the ESL may not inevitably lead to streamlining of the program: brevity does not always foster clarity.

Almost uniquely among major Commission programs, vast areas of E-rate policy are not reflected in any Commission rule, but have developed through common law precedent explained in Commission-level and delegated authority orders resolving individual party disputes. The current ESL provides a host of explanatory notes, definitions, and policy summaries that draw on these precedents and consolidate certain aspects of controlling E-rate requirements in single source.

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<sup>2</sup> *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Report and Order and Further Notice of Proposed Rulemaking, FCC 14-99 (rel. Jul 23, 2014), at ¶ 55.

<sup>3</sup> *Id.* at ¶ 56.

Viewed in this light, the abbreviated Draft ESL draws a decidedly mixed grade. The abbreviated Draft ESL) leaves out significant parts of the current ESL, at least some of which the Commission does not appear to have published elsewhere. The entire section of the current ESL titled “Special Eligibility Conditions” – which provides guidance on cost allocation, ancillary use, eligibility of users and locations, and other important eligibility topics – has been deleted. Similarly, the Glossary and many explanatory notes accompanying the basic list of equipment and services have been eliminated. While the Public Notice explains that the changes are intended to “implement[] the changes required by the *E-rate Modernization Order*,”<sup>4</sup> it is clear that the Draft ESL goes further. While the Public Notice characterizes these additional contractions as “presentation and formatting changes,”<sup>5</sup> it does not fully explain the extent to which they represent additional shifts in the policy positions of the Bureau.

Throughout the life of the E-rate program, the ESL has taken on progressively greater importance as a foundation document in defining the scope of the program. The ESL is, in fact, the product of a prior Commission effort to “simplify program administration and facilitate the ability of both vendors and applicants to determine what services are eligible for discounts.”<sup>6</sup> By adopting a formal annual process for publishing the ESL, the Commission sought an end to the former environment in which, “the only way an applicant can determine whether a particular service or product is eligible under our current rules is to seek funding for that service or product,

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<sup>4</sup> Public Notice at 1.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, FCC 03-323, 18 FCC Rcd 26912 ¶ 40 (2003) (“*Third Report and Order*”).

and then seek review of the Administrator's decision to deny discounts.”<sup>7</sup> The Commission intended the ESL to create a “safe harbor” for applicants, providing certainty as to whether their requests were eligible for funding.<sup>8</sup> By abbreviating the ESL, the Commission must take care not to similarly abbreviate the measure of guidance and certainty that the ESL provides.

The detail contained in the ESL is particularly vital because the Commission’s universal service administrator, the Universal Service Administrative Company (“USAC”) does not routinely make public any detailed explanations of its reasoning underlying eligibility determinations for individual funding requests or individual vendor components, either in connection with funding determinations for Form 471s or appeals. At least until USAC adopts greater transparency, the Commission should continue to provide information that is as complete as possible with respect to eligibility details that must necessarily shape applicant equipment and service funding requests.

This is especially important because USAC, as E-rate administrator, has no policymaking authority.<sup>9</sup> Rather, the Commission must give additional guidance as to the authority, scope, and interpretation of the ESL and, to achieve its goals of making the E-rate process, “fast, simple, and efficient,” must make this guidance transparent and timely for all applicants and service

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* (“The yearly updated list will interpret what may be funded under current rules, and will represent a safe harbor that all applicants can rely on in preparing their applications for the coming funding year.”).

<sup>9</sup> *Changes to the Board of Directors of the National Exchange Carrier Association*, CC Docket No. 97-21, Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in CC Docket No. 97-21, and Eighth Order on Reconsideration in CC Docket No. 96-45, FCC 98-306, 13 FCC Rcd. 25058 (1998), at ¶ 16 (“USAC's function under the revised structure will be exclusively administrative. USAC may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.”).

providers. The ESL is a policy document formally adopted by the Commission; it, together with codified federal rules and Commission orders have legal force that programmatic guidance published on the USAC web site does not. E-rate policy that the Commission intends to retain (such as “Special Eligibility Conditions”) should not therefore be deleted from the Draft ESL unless the Commission itself publishes it elsewhere.

Affiniti similarly recommends that the ESL Glossary be maintained, to the extent that the terms continue to appear in the ESL. Broadband and related technologies continue to evolve rapidly; while that fact makes the challenge of maintaining the Glossary incrementally greater, the formatting changes to the ESL make the task that much more important. Specifically, the Draft ESL omits the list of ineligible services included in earlier editions, stating that, “it will be more efficient for applicants to assume that any service or component not listed in the ESL is ineligible for E-rate support.”<sup>10</sup> Given that structure, the scope of the terms used to identify eligible services must be clear, and the Commission – not USAC – must wield the policymaking authority to define them. Discarding the Glossary could force USAC into a policymaking role by requiring it to decide on the fly how to interpret the list of equipment and services contained in the ESL.

#### **B. The ESL Should Address On-Premises Category One Components**

Some complicated eligibility issues have never been a part of the ESL, but should be. Leading this group are the detailed and needlessly complicated requirements for determining if on-premise components can be a part of a Category One solution. The Commission rules for on-premise Priority 1 components are based on seven criteria set forth in a Commission appeal

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<sup>10</sup> Public Notice at 3.

decision that is fifteen years old.<sup>11</sup> Since the decision was issued, and despite its lack of policymaking authority, USAC has created five additional criteria that it describes as “implications” of the *Tennessee Order*.<sup>12</sup> This area of eligibility is therefore extremely complicated needlessly opaque, with the full set of requirements applied by USAC contained nowhere in the Commission’s rules or orders, nor in the ESL.<sup>13</sup>

As Affiniti intends to discuss more fully in its comments on the Commission’s Further Notice of Proposed Rulemaking in this proceeding, Affiniti thus proposes that the Draft ESL be amended to include the additional statement that:

**The Category One service provided must consist of broadband services (which may utilize service provider-owned on-premises equipment) with specific demarcation between such service provider-owned equipment and Applicant components. To be eligible under Category One, such service provider-owned equipment is not to be incorporated in any Category Two component.**

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<sup>11</sup> *Federal-State Joint Board on Universal Service, Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator* CC Docket No. 96-45, Order, FCC 99-216, 14 FCC Rcd 13734 (1999) (“*Tennessee Order*”).

<sup>12</sup> See “On-Premises Priority 1 Equipment,” available at: <http://usac.org/sl/applicants/beforeyoubegin/eligible-services/priority-one.aspx> (visited Sept. 2, 2014).

<sup>13</sup> When USAC reviews a Priority One funding request that includes on-premise components, it frequently sends an information request to the applicant asking difficult-to-understand questions for each of the first seven areas above. It most often also requests a detailed network configuration diagram. Many times, once the applicant has responded to this complex set of questions, USAC will follow-up with an additional round of questions. This can include a conclusion that the funding request must be cost allocated to remove certain on-premise components. In some cases, USAC’s current application of the *Tennessee Order* appears to be at odds with the Order’s actual requirements, with the result that some applicants feel compelled to cost allocate an apparently eligible funding request in order to avoid a protracted delay in receiving funding. For example, USAC has taken the position for some applicants that multiple components at the applicant site, or a server at the applicant site, cannot be part of the Priority 1 solution, even when the criteria established by the Commission has been satisfied. However, both of these details were an integral part of the configuration that the Commission approved in its 1999 appeal decision.

Replacing the twelve criteria currently used to evaluate on-premises Priority One components with this bright-line test would achieve the Commission's simplicity goal in a manner that is consistent with current industry practices in other markets, while maintaining full program integrity.<sup>14</sup>

So simplified, USAC should need to request further information from applicants only in cases where the application does not clearly identify the location or use of the components in question. Affiniti is not aware of any information that suggests that Commission requirements in this area are being abused, so the need for multiple questions to applicants for every on-premise Priority 1 configuration appears unnecessary.

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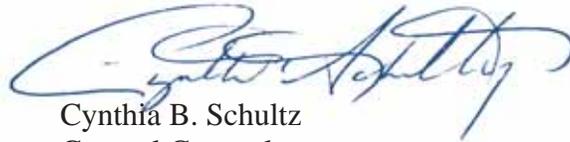
<sup>14</sup> The proposed simplification would allow multiple demarcations to be a part of the Priority One service. Currently, USAC's approach is to allow up to three demarcations, each dedicated solely video, data, or voice. In the current era where broadband is increasingly used to provide all of these, a distinction between data, video, and voice does not match with industry practices. Further, a fail-safe port is a standard component part of much current equipment. This allows automatic reconfiguration in the event of a network outage, but E-rate applicants are prohibited from using this standard feature under USAC's current processing standards. The proposed simplification resolves these issues.

**Conclusion**

For the foregoing reasons, the Commission should (1) retain the “Special Eligibility Conditions,” Glossary, and other explanatory notes contained in the ESL; and (2) simplify the treatment of on-premises Priority One components, and add that policy to the ESL, as discussed herein.

Respectfully submitted,

Affiniti LLC

A handwritten signature in blue ink, appearing to read 'Cynthia B. Schultz', is written over a light blue circular stamp.

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