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 FCC 14-99

Comments of Affiniti LLC

Affiniti, LLC ("Affiniti") hereby submits these comments in response to the Commission's Further Notice of Proposed Rulemaking[1] ("Further Notice") in the above-captioned proceeding concerning the schools and libraries universal service support mechanism ("E-rate"). In the Further Notice, the Commission seeks comment on certain specific proposals to "further simplify the administration of the E-rate program," as well as any other "additional steps" the Commission could take to advance its E-rate goals.[2]

Introduction and Summary

Affiniti focuses its comments on the specific issues raised in the Further Notice concerning the efficiency of long-term contracts, recommending that the Commission should leave applicants and service providers free to negotiate contracts of any mutually agreeable length. Affiniti also offers a series of "additional steps" that the Commission could take to advance its E-rate goals, including (1) clarifying that the Lowest Corresponding Price ("LCP") rules apply only to telecommunications services; (2) directing the Universal Service Administrative Corporation ("USAC") to suspend the phase down of funding for voice services after two years, while the Commission completes its planned assessment of the impacts of this change; and (3) simplifying the treatment of on-premises Category One components.

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1 *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). In these comments, the Report and Order portion of the Further Notice is called the "Report and Order."

2 Further Notice at ¶¶ 266-67.

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").

Discussion

In the Further Notice, the Commission cited three goals for its changes to the E-rate program: (1) to ensure affordable access to high-speed broadband sufficient to support digital learning in schools and robust connectivity for all libraries; (2) to maximize the cost-effectiveness of spending for E-rate supported purchases; and (3) to make the E-rate application process and other E-rate processes fast, simple and efficient.[3] In pursuit of these goals, the Further Notice seeks comment on a series of specific proposals, in addition to a general request for comment on additional steps the Commission can take to pursue these goals. Affiniti believes that the Commission has a series of opportunities within its easy grasp that would be consistent with these goals.

A. Maximum Contract Length Should Be Negotiated by the Applicant and Service Provider, Not Specified by the Commission (¶¶ 271-278)

While the Further Notice indicates the Commission's desire to "ensur[e] that multi-year contracts are efficient,"[4] the Commission's proposal to limit such contracts to a maximum term of five years, including voluntary extensions, is contrary to that goal. The Further Notice seeks

[3] Further Notice at ¶ 267, n. 647.

[4] *Id.* at ¶ 271.

comment on how best to "balance the advantages that longer term contracts give applicants against the opportunity that shorter term contracts give applicants to take advantage of rapidly falling prices in a dynamic marketplace."[5] But, there is no need for the Commission to engage in such balancing. E-rate applicants are capable (and better positioned) to weigh their own individual circumstances, and seek a contract length that best meets their needs.

First, there is no need for a national rule in this regard. Establishing a federal rule governing maximum contract length would preempt the judgment of state and local authorities on the matter. While the Commission's national perspective is valuable, there is considerable variation among local procurement environments across the nation, including the degree of competition to be expected in the market, the anticipated trajectory of pricing over time, and the administrative costs of the procurement process in relation to the value of the contract and potential savings available. There is no reason to supplant the more nuanced judgment of state and local authorities with responsibility for establishing procurement rules and processes that govern applicants in this area.

In seeking comment on whether a maximum contract length would conflict with any state and local procurement laws,[6] the Commission misses the mark. Some states impose no limit at all. The question is not whether a five-year cap would be merely redundant to existing state and local procurement laws that specify equivalent or shorter periods, not whether there are state or local laws that require service contracts to extend beyond five years,[7] but whether there is some overriding matter of federal E-rate policy so vital to the program that the Commission should

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[5] *Id.*

[6] *Id.* at ¶ 274.

[7] *Id.*

create a new national rule. With every new national rule the Commission creates, it undercuts its goal to make its E-rate processes "fast, simple and efficient."[8] Every new rule represents a potential trap for the unwary, a new box that USAC reviewers have to check, and a new source of appeals and requests for review when funding is denied. The Commission has already established a more-than-adequate baseline of federal standards to safeguard against waste, fraud, and abuse of E-rate funds; it should resist the urge to wade into details best handled at the state and local levels.

Second, the market already provides robust checks on the maximum length of E-rate contracts. As the Further Notice explains, contract length is the product of competing considerations, including expected price changes over time, the administrative costs of the procurement process, the more favorable terms available from multi-year contracts, anticipated changes in the applicant's service needs over time, and other factors.[9] While the Further Notice suggests that, "shorter-term contracts allow applicants to take advantage of falling market prices,"[10] there is no empirical reason why a shorter term should necessarily provide greater benefits to the applicant in this regard than a lengthier term. To the contrary, price changes over time can, and often are, built into the contract terms. Contracts may provide for annual adjustment or renegotiation of recurring charges. Even those that do not are likely to reflect the parties' expectations as to changes in the price of services over the life of the contract.

If, as the Commission suggests, per-megabit prices for broadband services have "consistently been declining over time,"[11] then the parties are capable of setting recurring charges for these services

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8 Report and Order at ¶ 55.

9 Further Notice at ¶ 273.

10 *Id.*

11 *Id.*

in a five-year contract or a ten-year contract, for example, that are lower than those available on a one-year contract. But, such fixed-price contracts often represent as big a risk to the service provider as the applicant. Declining equipment costs, over time, are counterbalanced by rising personnel costs and other operating expenses, meaning that the precise course of future price changes is uncertain. Yet, the service provider must be aggressive with its assumptions in order to remain competitive against other proposals. If expected price declines do not materialize as quickly as the parties anticipated, the applicant may wind up paying a below-market rate for a significant portion of the contract term. And, applicant option years provide further "heads-I-win, tails-you-lose" protection that compounds the advantages to the applicant.

Third, longer-term contracts offer the applicant and service provider alike the ability to anticipate their future obligations. The service provider obtains the certainty of a revenue stream over time, while the applicant simplifies its budget planning and procurement processes for a series of future years. The Commission's E-rate structure – which ensures that applicants remain sensitive to market pricing signals through their obligation to pay the non-discounted share of the contract cost – encourages them to purchase only services that address true needs, and to seek the most efficient option for obtaining those services, even if doing so entails a contract term of more than five years. If the parties find that a contract term of more than five years provides sufficient benefit to both parties, there is no reason for the Commission to second-guess that judgment.

Fourth, at a minimum, the Commission should exempt contracts that require the service provider to build new facilities from any length limitation.[12] The Commission has recognized the need for additional investment in infrastructure to meet the future broadband needs of the

[12] *Id.* at ¶ 276.

nation's schools and libraries.[13] Longer-term contracts can provide the necessary incentives and revenue certainty for Affiniti and other service providers to build new facilities necessary to serve an applicant that currently cannot receive service that meets the Commission's broadband speed targets, while minimizing the annual burden on applicants and the E-rate program alike.

B. The Commission Should Take Additional Steps to Further Its E-rate Goals (¶ 267)

In the Further Notice, the Commission seeks comment on other "additional steps" the Commission could take to advance its E-rate goals.[14] Affiniti offers the suggestions that follow.

1. The Commission Should Clarify that the LCP Rule Applies Only to Telecommunications Services

In the Report and Order, the Commission "remind[ed] service providers that they not only must charge eligible schools, libraries, and consortia the LCP when providing E-rate services, but also must offer eligible entities the LCP when submitting competitive bids to provide E-rate supported services."[15] While the Commission's new rule applies on its face to all E-rate supported services – telecommunications services, Internet access, and internal connections – the Commission has never adequately explained either its statutory authority to impose the LCP rule on other than telecommunications services, or the process it intends to follow in evaluating claims of LCP violations.[16]

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[13] *E.g., id.* at ¶ 268; *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Public Notice, "Wireline Competition Bureau Seeks Focused Comment on E-Rate Modernization Issues," DA 14-308 (rel. Mar. 6, 2014), at ¶ 27 (seeking comment on options to "provide some additional support for the capital costs associated with high-capacity deployment").

[14] Further Notice at ¶¶ 266-67.

[15] 47 C.F.R. § 54.511(b); Report and Order at ¶ 183.

[16] The Commission's attempts to extend the LCP rule beyond telecommunications services have already created widespread confusion among service providers and applicants. *See,*

The statutory foundation for the LCP rule provides that, "[a]ll telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3) of this section, provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties."[17] Thus, the LCP rule was originally enacted to apply only to providers of telecommunications services. In adopting the 1997 *Universal Service Order*, the Commission explained that the rule would "require that a ***carrier*** offer services to eligible schools and libraries at prices no higher than the lowest price it charges to similarly situated non-residential customers for similar services."[18] It explained at the time that its goal was to "ensure that a lack of experience in negotiating in a competitive ***telecommunications service*** market does not prevent some schools and libraries from receiving such offers."[19] And, in describing the geographic area over which the rule would apply, the Commission stated:

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e.g., USAC, 2012 SL Monthly Conference Call Minutes, at 23 (June 6, 2012 minutes) and 41 (Nov. 14, 2012), *available at:* http://usac.org/_res/documents/sl/pdf/conference-calls/archive/2012-SL-Minutes.pdf; *Schools and Libraries Universal Service Support Mechanism; Petition of United States Telecom Association and CTIA – The Wireless Association for Declaratory Ruling Clarifying Certain Aspects of the "Lowest Corresponding Price" Obligation of the Schools and Libraries Universal Service Program*, CC Docket No. 02-6, Comments of Consolidated Communications, Fairpoint Communications, Frontier Communications, Hawaiian Telcom, Inc., Iowa Telecommunications Services, Sprint Nextel Corporation, Surewest Communications, Windstream Communications, CTIA – The Wireless Association, ITTA, NTCA, OPASTCO, USTelecom, WTA (filed May 14, 2010).

[17] 47 U.S.C. § 254(h)(1)(B).

[18] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, 12 FCC Rcd 8776 (1997), at ¶ 484 ("*Universal Service Order*") (subsequent history omitted) (emphasis added).

[19] *Id.* (emphasis added).

> "We do not limit here the area in which a ***telecommunications carrier*** or a subsidiary or affiliate owned or controlled by it can choose to provide service. We also agree with the Joint Board that ***telecommunications carriers*** be required to offer schools and libraries services at their lowest corresponding prices throughout their geographic service areas.[20]

With specific regard for the certification requirement governing "lowest corresponding price" compliance, the Commission explicitly limited the scope of the rule to providers of Tier 1 telecommunications services, stating:

> [W]e agree with the Joint Board's recommendation that, as a condition of receiving support, ***carriers*** be required to certify that the price they offer to schools and libraries is no greater than the lowest corresponding price based on the prices the carrier has previously charged or is currently charging in the market. ***This obligation would extend, for example, to competitive LECs, wireless carriers, or cable companies, to the extent that they offer telecommunications for a fee to the public.***[21]

Thus, unlike the expansive reading suggested in the Report and Order, Section 54.511(b) should be read to encompass only telecommunications services.[22] This is particularly so given that, neither in 1997 or subsequently, has the Commission asserted Title II regulatory authority

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[20] *Id*. at ¶ 487 (emphasis added).

[21] *Id.* (emphasis added). The remedies contemplated by the Commission similarly focus on telecommunications services, with the Commission's rule providing that, "[s]chools, libraries, and consortia including those entities, and service providers may have recourse to the Commission, regarding interstate rates, and to state commissions, regarding intrastate rates, if they reasonably believe that the lowest corresponding price is unfairly high or low. 47 C.F.R. § 54.504(c); *Universal Service Order* at ¶ 490.

[22] In one of its few decisions discussing the rule after that time, the Commission reinforced this interpretation. Discussing the regulatory status of the Iowa Communications Network, the Commission stated that, "to achieve the goal of allowing schools and libraries to obtain telecommunications services at discounted rates, Congress designed a system by which ***common carriers***, in the course of providing service to the public generally, are required to offer discounted rates to those eligible entities . . . . The ***carriers*** shall offer the lowest corresponding price to eligible schools and libraries, and shall be reimbursed by the universal service support mechanism for the difference between the lowest corresponding price and the discount for which a school or library is qualified, pursuant to our rules." *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Declaratory Ruling, FCC 99-10, 14 FCC Rcd 3040 (1999) (*Iowa Communications Network*"), at ¶ 8 and n.18 (emphasis added).

over the pricing of Internet access services or internal connections. Given the significant Title II jurisdictional questions that such an unprecedented assertion of authority over rates for non-telecommunications services would raise, had that been the intent of the rule, it would be exceedingly strange for the Commission to have adopted it without a single word to explain the basis for its statutory authority.

Nor has the Commission explained how it would evaluate an LCP complaint regarding charges for Internet access or internal connections. These services are not price-regulated by the Commission, and a host of individualized factors may conspire to affect pricing that service providers can offer to individual applicants. The Commission has never articulated clearly how it would determine whether the services offered to an E-rate applicant are "similar" to those offered to other parties, nor how it would establish the set of "other parties" to which E-rate applicants will be compared.[23]

Finally, the Commission should explain how the "safety valve" included in Section 54.511(b) will work with respect to Internet access and internal connections. Section 54.511(b) permits service providers to charge a rate above the LCP if "the Commission, with respect to interstate services or the state commission with respect to intrastate services, finds that the lowest corresponding price is not compensatory."[24] But, many of the services in question – particularly Category Two internal connections – are non-jurisdictional. Providers of these services have never been price-regulated by the Commission (or any state public utility commission), and may

[23] 47 U.S.C. § 254(h)(1)(B).

[24] 47 C.F.R. § 54.511(b).

find it difficult or impossible to provide regulators, USAC, or E-rate auditors with the type of cost justification that might be available in the case of regulated telecommunications services.

Rather than imposing the LCP rule on unregulated Internet access and internal connections services, the Commission should, at least for an interim period, rely on its new transparency rules to achieve its efficiency goal and safeguard E-rate funds. In requiring USAC to publish "information regarding the specific services and equipment purchased by schools and libraries, as well as their line item costs,"[25] the Commission will enable applicants themselves to determine whether the prices they are seeing in service provider bids are reasonable, and to negotiate accordingly. There is no need for an LCP enforcement process to backstop this efficient market-based check.

2. The Commission Should Suspend the Phase Down of Funding for Voice Services Following Funding Year 2016

In the Report and Order, the Commission adopted a multi-year phase down of E-rate support for voice services, concluding that voice services "are not as essential as high-speed broadband is for meeting the educational needs of students and library patrons."[26] During this transition, the maximum discount available for voice services will decrease by 20 percentage points per year, until the E-rate discount is eliminated. While the Commission cited a series of factors that it hopes will minimize the impact on school and library communications budgets, it also asked the Wireline Competition Bureau to study the impact of the transition on E-rate recipients over the first two years (*i.e.*, Funding Years 2015 and 2016) and report its findings no later than October 1, 2017.[27]

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[25] Report and Order at ¶ 160.

[26] *Id.* at ¶¶ 135.

[27] *Id.* at ¶ 143.

Nevertheless, the Commission stated that, "[i]f, by the opening of the funding year window for funding year 2018, the Commission takes no further action, the voice phase down will continue."[28]

The Commission should modify this transition to suspend the voice phase down for Funding Year 2017 and beyond, until the Commission has completed its review of the Bureau's findings, and issued its conclusions in a written order. As the schedule stands, there is at least an ambiguity with regard to funding year 2017 already; the Report and Order does not explicitly mention a pause in the phase down process, but asks the Commission to issue the results of its study of Funding Years 2015 and 2016 no later than October 1, 2017, once the next funding year has already started. The Commission, however, then indicates that the phase down will "continue," if the Commission takes no action before the opening of the Funding Year 2018 window.

Unless the Commission suspends the phase down, it will lose a significant part of its opportunity to implement any necessary mid-course correction or reversal, if the Bureau's study were to reveal any negative impacts on applicants. Even by the time the Bureau issues its findings, the next step of the phase down will be complete: the Funding Year 2017 window will be closed and the funding year itself well underway. To proceed in such a "ready, fire, aim" fashion would deprive the Commission and E-rate program participants alike of the benefit of considering the results of the very study the Commission has explicitly commissioned.

3. The Commission Should Simplify Its Treatment of On-Premises Category One Components

In its comments on the *ESL Public Notice*,[29] Affiniti urged the Commission to simplify its treatment of on-premises Category One components by replacing the vintage seven-factor test

[28] *Id.* at ¶ 135.

from the 1999 *Tennessee Order*[30] and the five additional criteria that USAC claims are "implications" of that Order,[31] with a single sentence explanation that captures the essence of the Commission's concerns. As proposed by Affiniti, the Commission should replace these twelve criteria with a statement in the Eligible Services List 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.**[32]

This change would advance the Commission's goal of making E-rate processes faster, simpler, and more efficient in a manner that is consistent with current industry practices in other markets, while maintaining full program integrity. It would eliminate the need for many of the complicated information requests that USAC sends today in connection with such funding requests, and would simplify those where additional information remains necessary. Indeed, Affiniti suggests that, once this change is made, USAC should reach out for further information only in cases where it is necessary to resolve open questions of fact regarding the design or function of an on-premises component included in the funding request. Affiniti is not aware of any

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29 *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).

30 *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).

31 *See* "On-Premises Priority 1 Equipment," available at: http://usac.org/sl/applicants/beforeyoubegin/eligible-services/priority-one.aspx (visited Sept. 11, 2014).

32 *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Comments of Affiniti, LLC (filed Sept. 3, 2014), at 6 (attached hereto as **Exhibit A**).

suggestion that Commission requirements in this area are being abused, so the need for multiple questions to applicants for every on-premise Category One configuration is currently overstated.

The *Tennessee Order* hails from the very early days of E-rate, when the Commission and USAC lacked the level of experience in administering E-rate issues that they possess today. The concern the Commission had at that time—that components would be funded as Priority One when they would be used as a part of a Priority Two configuration—was legitimate. With the passage of time, greater familiarity with typical industry configurations, and, in particular, the Commission's decision to provide a more level playing field as to the funds available for Category Two services, however, the extraordinarily detailed requests for information about on-premise Category One configurations no longer serve a reasonable administrative or regulatory purpose. The current assessment of eligibility imposes unnecessary information requirements and costs on both applicants and service providers. Further, these complex evaluation criteria open applicants to the possibility of an inadvertent mistake in responding to questions that can be difficult to interpret. The result is inappropriate denials that must be slowly resolved through the appeals process, requiring resources the applicant, service provider, USAC, and Commission could put to better purposes.

Conclusion

For the foregoing reasons, the Commission should (1) refrain from imposing a maximum E-rate contract length for supported services; (2) clarify that the LCP rule applies only to telecommunications services; (3) suspend the phase down of support for voice services following the conclusion of funding year 2016; and (4) simplify the treatment of on-premises Priority One components, as discussed herein.

Respectfully submitted,

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September 15, 2014

Exhibit A

Modernizing the E-rate Program for Schools and Libraries, WC Docket No. 13-184,
Comments of Affiniti, LLC (filed Sept. 3, 2014)

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[1] 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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[1] *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."[2] 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.[3] 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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[2] *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.

[3] *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 lease 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*,"[4] it is clear that the Draft ESL goes further. While the Public Notice characterizes these additional contractions as "presentation and formatting changes,"[5] 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."[6] 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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4 Public Notice at 1.

5 *Id.* at 3.

6 *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."[7] The Commission intended the ESL to create a "safe harbor" for applicants, providing certainty as to whether their requests were eligible for funding.[8] 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.[9] 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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7 *Id*.

8 *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.").

9 *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."[10] 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

[10] Public Notice at 3.

decision that is fifteen years old.[11] 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*.[12] 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.[13]

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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[11] *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*").

[12] *See* "On-Premises Priority 1 Equipment," available at: http://usac.org/sl/applicants/beforeyoubegin/eligible-services/priority-one.aspx (visited Sept. 2, 2014).

[13] 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.[14]

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.

[14] 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,

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