

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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

**PETITION FOR RECONSIDERATION
OF THE UNITED STATES TELECOM ASSOCIATION**

Pursuant to Section 1.429 of the Commission’s rules,¹ the United States Telecom Association (USTelecom)² respectfully petitions the Commission to reconsider an aspect of its E-Rate order (*Order*).³ The *Order* instituted several reforms to the Commission’s schools and libraries universal service support program (the “E-Rate Program”). The majority of the Commission’s reforms are intended to comprehensively reform and update the E-Rate Program through greater focus on high capacity broadband and better targeting of E-Rate funds.

USTelecom supports the Commission’s efforts to reform the E-Rate Program and is generally supportive of the Commission’s actions taken in the *Order*. However, there is an aspect of the *Order* where the Commission overstepped its authority and implemented a rule inconsistent with existing law that will adversely impact the E-Rate Program if implemented.

¹ 47 C.F.R. § 1.429.

² USTelecom is the premier trade association representing service providers and suppliers for the telecom industry. Its diverse member base ranges from large publicly traded communications corporations to small companies and cooperatives – all providing advanced communications services to both urban and rural markets.

³ Report and Order and Further Notice of Proposed Rulemaking, *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184 (rel. July 23, 2014) (*Order*).

The Commission should reconsider its proposal to implement a ten-year document retention period.⁴

The Commission's doubling of the document retention period is, contrary to the Commission's assertion,⁵ unnecessary for compliance with the False Claims Act⁶ and is inconsistent with recent appellate precedent. The Commission's decision also will not result in any administrative benefits, nor enhance the efficiency and integrity of the E-Rate Program. The record in this proceeding clearly shows that extension of the document retention period to ten years will only increase administrative burdens and costs while providing no tangible benefits. There is also no basis in the record to support the Commission's conclusion that electronic storage of documents will dramatically reduce the costs of document retention. Indeed, the record clearly and overwhelmingly supports a finding to the contrary. We respectfully request the Commission to reconsider its *Order* consistent with this petition.

I. The Commission's New Document Retention Requirements Are Unnecessary for Compliance With the False Claims Act.

The Commission should reconsider its decision to double the existing record retention requirement from five to ten years for participants in the E-Rate Program.⁷ The Commission based its ten-year record retention requirement on the need to conform to the requirements of the False Claims Act. However, the False Claims Act is designed to ferret out fraudulent claims by government contractors, not to increase the recordkeeping expense of government contractors.⁸

⁴ *Order*, ¶¶ 261 - 263.

⁵ *Order*, ¶ 262.

⁶ 31 U.S.C. §§ 3729-33.

⁷ *Order*, ¶ 262.

⁸ See 31 U.S.C. §§ 3729-33. The False Claims Act provides in part that "any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or

In fact, the False Claims Act imposes no affirmative record-keeping requirements on persons or entities submitting claims to the government.

Although the False Claims Act contains a ten-year statute of limitations,⁹ this provision hardly warrants establishing an equivalent record retention obligation. Indeed, a statute of limitations period by which a claim must be brought and a recordkeeping period during which records must be maintained serve fundamentally different purposes – purposes that the *Order* conflates. Furthermore, the costs of maintaining and storing records for ten years is significant – costs that the Commission largely ignores and that greatly outweigh any purported benefit from having available records during the entire time that a person could theoretically assert a False Claims Act claim.

A ten-year document retention requirement also significantly exceeds the period for maintaining documents under other federal programs. For example, five-year employment and call record retention requirements apply for Video Relay Services,¹⁰ and other Commission record retention requirements extend for two years or less.¹¹ The unreasonableness of a ten-year record retention requirement is underscored by regulations implementing the Sarbanes-Oxley

approval . . . is liable to the United States Government for a civil penalty. . . .” 31 U.S.C. § 3729(a)(1)(a).

⁹ 31 U.S.C. § 3731(a)-(b).

¹⁰ See Second Report and Order, *Structure and Practices of the Video Relay Service Program*, 26 FCC Rcd 10898, ¶ 28 (July 28, 2011); Report and Order and Further Notice of Proposed Rulemaking, *Structure and Practices of the Video Relay Service Program*, 26 FCC Rcd 5545, ¶¶ 85, 87 (2011).

¹¹ See, e.g., 47 C.F.R. § 64.2008(a)(2) (one year record retention of customer proprietary network information for telecommunications carriers); 47 C.F.R. § 42.6 (18 month record retention of billing records for common carriers); Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, 26 FCC Rcd 14557, ¶ 225 (2011) (two year record retention after a covered entity ceases to offer a product).

Act and the Equal Credit Opportunity Act that embody shorter record retention periods.¹² The Commission’s ten-year record retention requirement also contravenes the purpose of the Paperwork Reduction Act¹³ by maximizing the paperwork burden for USF recipients with little, if any, corresponding benefit.

II. The Commission’s Order is Inconsistent with a Recent Appellate Decision.

Just four days before the Commission adopted its *Order*, the Court of Appeals for the Fifth Circuit (Fifth Circuit) concluded that the False Claims Act does not apply to funds administered through the E-Rate Program.¹⁴ As such, the Commission’s claim that the “current five-year document retention requirement is not adequate for purposes of litigation under the [False Claims Act],”¹⁵ is not supported by existing case law.¹⁶

The Fifth Circuit’s timely opinion deals directly with the issue of whether the E-Rate Program, administered by the Universal Service Administrative Company (USAC), is subject to the provisions of the False Claims Act. In issuing its opinion, the Fifth Circuit was addressing the “threshold issue of whether [False Claims Act] liability extends to requests submitted to the

¹² 17 C.F.R. § 210.2-06 (seven-year retention of audit records); 12 C.F.R. § 202.12 (25-month retention for creditor applications); 15 C.F.R. § 14.53(b)-(d) (three-year retention for recipients of federal grants, which is extendable if audit commences during that time).

¹³ 44 U.S.C. § 3501-3521.

¹⁴ *Rene Shupe v. Cisco Systems Incorporated, et al.*, No. 13-40807, 2014 WL 3057093 (5th Cir. July 7, 2014) (*Opinion*).

¹⁵ *Order*, ¶ 262.

¹⁶ Under the Commission’s rules, “a petition for reconsideration which relies on facts or arguments which have not previously been presented to the Commission will be granted” only if the “facts or arguments relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission.” 47 C.F.R. § 1.429(b)(1). The Fifth Circuit’s opinion was published on July 7, 2014, which was just four days prior to the Commission adopting its *Order*. As such, it was subject to the Commission’s sunshine rules and could not be addressed in the record.

[Universal Service Administrative Company] for reimbursement from the [Universal Service Fund].”¹⁷

The Fifth Circuit had to determine whether “the Government “provides any portion of” requested money, as to trigger the protection of the False Claims Act.”¹⁸ It focused on the definition of “claim” in the False Claims Act which applies only when “the United States Government . . . *provides or has provided any portion* of the money or property requested or demanded.”¹⁹

The Fifth Circuit recognized the fact that E-Rate Program funds are collected and administered by Universal Service Administrative Company (USAC).²⁰ While acknowledging that the Commission “may have a regulatory interest in the E-Rate program,”²¹ and that the Commission “retains some oversight and regulation,” it determined that USAC was “explicitly a private corporation owned by an industry trade group.” The Fifth Circuit therefore concluded that because “the money in the USF is untraceable to the United States Treasury . . . the United States does not have a financial stake in its fraudulent losses.”²²

Given the Fifth Circuit’s decision, there is no basis for the Commission to claim a need for extended document retention periods in order to comply with the False Claims Act. The absence of any applicability of the False Claims Act to the E-Rate Program undercuts any need for the Commission to extend its document retention period.

¹⁷ *Opinion*, p. 3.

¹⁸ *Id.*, p. 4.

¹⁹ *Id.*, p. 4, citing 31 U.S.C. § 3729(b)(2)(A)(ii)(I) (2012) (emphasis in original).

²⁰ *Id.*, p. 2.

²¹ *Opinion*, p. 9.

²² *Id.*

III. Extending the Document Retention Period is Unnecessary and is Inconsistent With the Record in this Proceeding.

Under well-established precedent, agencies must justify changes to existing rules.²³ The Commission's record in this proceeding clearly shows that the administration, efficiency or integrity of the E-Rate Program will not be enhanced by extending the document retention period to ten years. Further, there is no evidence submitted in the record to support the Commission's contention that electronic storage of documents will defray the costs resulting from the doubling of the document retention period from the current five years.

A. No Benefits Will Accrue to the Administration, Efficiency or Integrity of the E-Rate Program Through Adoption of a Ten Year Document Retention Period.

The record in this proceeding does not support the Commission's contention that the benefits to the integrity of the program outweigh the burdens of extending our document retention rules to 10 years.²⁴ With the exception of a single commenter, parties addressing the Commission's ten year document retention proposal were uniformly opposed, with one commenter finding the suggestion "flummoxing,"²⁵ and another stating that the five-year record retention period was "bad enough" and extending it to ten years was "unthinkable."²⁶ Another party stated that it was "inconceivable" that a case would surface that would require USAC to identify documents greater than five years old, let alone ten years old from date of installation.²⁷

²³ See e.g., *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810-12 (2009); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.").

²⁴ *Order*, ¶ 262.

²⁵ Comments of Blackboard Engage, WC Docket No. 13-184, p. 31 (submitted Sept. 16, 2013).

²⁶ Comments of E-Rate Central, WC Docket No. 13-184, p. 9 (submitted Sept. 16, 2013).

²⁷ Comments of Miami Dade County Public Schools, WC Docket No. 13-184, p. 15 (submitted Sept. 16, 2013).

A common theme running through all the commenters opposed to the Commission's proposal was that the significant burdens and costs associated with the doubling of the retention period far outweighed any perceived benefits. One municipal public school district noted that in its 15-year history of audits involving the E-Rate Program, "not a single case has surfaced where information was needed and/or requested that was greater than three years old."²⁸ Another stated that it was "unable to ascertain any benefit from doubling the document retention requirement that would outweigh the burden imposed on schools, libraries, and vendors," and that adoption of the extended period would turn a "blind eye to administrative efficiency."²⁹

Multiple state-level agencies and representatives opposed the Commission's proposal, including Hawaii, Iowa, Kentucky, Nebraska, New York, South Carolina, Utah, Washington, and West Virginia. When the West Virginia Department of Education polled its districts they found that the majority concluded the proposal would be "excessive and unnecessarily burden a district."³⁰ The Iowa Department of Education "strongly" disagreed with the proposal, stating that there "appear[ed] to be no compelling arguments in favor of the extension."³¹

The voluminous record in the proceeding clearly demonstrates that the Commission's change to its document retention rules will achieve no benefits to the administrative efficiency

²⁸ *Id.* See also, Comments Council of the Great City of Schools, WC Docket No. 13-184, p. 14 (submitted September 16, 2013) (stating that as one the program's "largest applicants, we have undergone the greatest scrutiny, the largest numbers of audits, and the most overall inquiries and reviews," and were "unaware of any situation in which documents were required beyond a three year time period.").

²⁹ Comments of Blackboard Engage, WC Docket No. 13-184, pp. 31, 32 (submitted Sept. 16, 2013).

³⁰ Comments of the West Virginia Department of Education, WC Docket No. 13-184, p. 110 (submitted Sept. 16, 2013).

³¹ Comments of the Iowa Department of Education, WC Docket No. 13-184, p. 17 (submitted Sept. 16, 2013).

and integrity of the program. As amply demonstrated in the record, the costs and burdens associated with administering this change far outweigh any perceived benefits.

B. The Commission’s Conclusion That Electronic Storage of Documents Will Dramatically Reduce Costs is Not Supported by the Record.

The Commission in its *Order* acknowledged the administrative and financial burdens that would result from doubling the document retention period. These increased burdens and costs were cited by nearly 60 commenters in the proceeding. For example, eChalk, Inc. states that extension of the document retention period to ten years “only increases the burden and the cost of services to the school, the vendor and the SLD.”³² The State of Hawaii reported that it already spends “approximately 20-30% of its communications resources on data collection and compliance,” and urged the Commission to ensure that its streamlining efforts are not “offset by the adoption of new administrative requirements.”³³

In addressing the financial costs in its *Order*, the Commission briefly acknowledges concerns that extending the mandatory document retention period to 10 years “may create additional administrative burdens and incur document storage costs.”³⁴ Of the more than 2,500 comments filed in this proceeding,³⁵ the Commission references a sole commenter supporting extension of the document retention period to ten years.³⁶

³² Comments of eChalk, Inc., WC Docket No. 13-184, p. 4 (submitted October 17, 2013).

³³ Comments of the State of Hawaii, WC Docket No. 13-184, p. 14 (submitted Sept. 16, 2013).

³⁴ *Order*, ¶ 262.

³⁵ USTelecom conducted a search of the Commission’s Electronic Comment Filing System (ECFS) on September 11, 2014 for comments submitted in docket number 13-184 between September 16, 2013 and July 3, 2014. The results indicate that 2,525 comments were filed during that time period.

³⁶ *See*, Comments of the San Jacinto Unified School District, WC Docket No. 13-184, p. 3 (submitted September 16, 2013) (*San Jacinto Comments*). In stark contrast, approximately fifty parties filed in direct opposition to the Commission’s proposal to extend document retention periods (USTelecom conducted a full text search of the phrase “document retention” using the

In citing to the sole supportive comment, the Commission states that it “agree[s] with the San Jacinto School District that electronic storage of documents can *dramatically reduce these costs*.”³⁷ But the comments of the San Jacinto School District (San Jacinto) on which the Commission relies in making its claim of “dramatic” cost reductions make no reference whatsoever to cost savings.

Instead, while it stated that electronic storage is a “must,”³⁸ it simply noted that electronic storage was more practical than physical storage since the physical housing of such documentation was “difficult due to varying sizes of binders from service providers, not fitting into boxes easily and limited space available to physically store these materials.”³⁹ San Jacinto made no arguments whatsoever regarding “dramatic” reduction in costs due to electronic storage. Given that this was the sole commenter relied upon by the Commission, it has no basis whatsoever in the record to claim that E-Rate Program participants will achieve “dramatic” cost savings through online storage.⁴⁰

Some commenters pointed out that the electronic storage of documents is not a panacea for reducing administrative costs. For example, the Riverside County Office of Education (Riverside County) provided detailed comments stating that adoption of the Commission’s proposal means that storage costs could “skyrocket due to increasing document retention

Commission’s ECFS on September 11, 2014 for comments submitted in docket number 13-184 between September 16, 2013 and July 3, 2014. The results indicate that more than fifty comments were filed during that time period in direct opposition to the Commission’s document retention proposal.)

³⁷ *Order*, ¶ 262 (emphasis added).

³⁸ *See, San Jacinto Comments*, p. 3.

³⁹ *Id.*

⁴⁰ *Order*, ¶ 262.

requirements.”⁴¹ Riverside County explained that when considering electronic storage of documents one must “also factor in the increased cost of scanning in paper forms, processing of indexing keywords, running indexing activities and quality control before accepting the document as a ‘legally authentic and tamper proof one.’”⁴²

Riverside County further details the substantial administrative and logistical demands associated with electronic storage. It points out that that it currently “takes a business services technician, a department secretary, a document retention technician and an external electronic archival and retrieval company at least 8-16 hours a week keeping up with the document retention and destruction policies of the County Office.”⁴³

Simply stated, the Commission’s belief that document retention costs can be “dramatically” reduced through electronic storage is unsupported in the record. In fact, the record contains overwhelming evidence to the contrary.

⁴¹ Comments of the Riverside County Office of Education, WC Docket No. 13-184, p. 5 (submitted Sept.15, 2013).

⁴² *Id.*

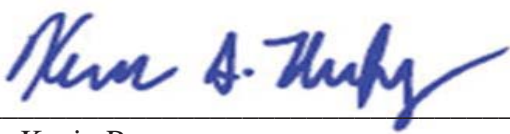
⁴³ *Id.*

IV. Conclusion

The Commission should reconsider the ten year document retention period adopted in the Order. The Commission's decision is contrary to good public policy and to law.

Respectfully submitted,

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