

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

In the Matter of
Requests for Waiver of
Decisions of the
Universal Service Administrator by
Batesville Community School Corporation, et al.
Batesville, Indiana
Schools and Libraries Universal Service
Support Mechanism
Modernizing the E-rate Program for Schools and
Libraries
File No. SLD-1019403, et al.
CC Docket No. 02-6
WC Docket No. 13-184

ORDER

Adopted: July 21, 2016

Released: July 21, 2016

By the Chief, Telecommunications Access Policy Division, Wireline Competition Bureau:

1. Consistent with precedent, we deny the Requests for Waiver from the petitioners listed in the Appendix seeking waivers of the Commission’s cost effectiveness requirements for the E-rate program (the Waiver Requests). The Universal Service Administrative Company (USAC), the administrator of the E-rate program, denied the petitioners’ requests for funding for individual data plan and air card services for funding year 2015 because the petitioners failed to show that it was more cost-effective to purchase access to the Internet through the use of individual data plans or air cards than to use a wireless local area network (WLAN) connected to the Internet. We affirm USAC’s findings that the services requested are not cost effective and find that none of the petitioners present evidence that would justify waiving the Commission’s cost effectiveness requirements for individual data plans or air cards. For the reasons described below, we also find petitioners’ other arguments unavailing.

1 See, e.g., Federal-State Joint Board on Universal Service, CC Docket No. 96-45, AAD/USB File No. 98-34, Memorandum Opinion and Order, 13 FCC Rcd 24968, 24973-74, paras. 14-15 (CCB 1998) (Seven School Districts Order); Request for Waiver by Otsego Local School District, Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 22 FCC Rcd 4760, 4762-63, para. 6 (WCB 2007) (denying waiver requests because the petitioners did not establish “special circumstances” that would justify a waiver of the Commission’s general rule and where the petitioners did not provide any reason to believe the current requirement unfairly discriminated against the petitioners as compared to any other school districts in the same or similar position).

2 The E-rate program is more formally known as the schools and libraries universal service support program.

3 See, e.g., Letter from Schools and Libraries Division, USAC, to Steve Mills, Greater Clark County School District (Aug. 28, 2015); Letter from Schools and Libraries Division, USAC, to Steve Mills, Jay School Corporation (July 31, 2015).

4 Generally, the Commission’s rules may be waived if good cause is shown. 47 CFR. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (Northeast Cellular).

(continued....)

2. Background. In the *First E-rate Modernization Order*, the Commission made changes to the E-rate funding framework to reorient the program to focus on broadband support. It adopted three goals for the program: (1) ensure affordable access to high-speed broadband sufficient to support digital learning in schools and robust connectivity for all libraries; (2) maximize the cost-effectiveness of spending for E-rate supported purchases; and (3) make the E-rate application process and other E-rate processes fast, simple, and efficient.⁵ In order to achieve the first two goals, among other things, the Commission adopted changes to the program to ensure that more equitable, reliable support would be available for WLANs that support broadband services within schools and libraries.⁶ Relatedly, the Commission determined that funding for individual data plans or air cards for individual users is not cost effective when those users can access the Internet through internal wireless broadband networks on wireless-enabled devices.⁷

3. At the same time, the Commission recognized that there could be limited circumstances when individual data plans or air cards may be cost effective and provided a process for applicants that seek funding for individual data plans to show cost effectiveness.⁸ To establish cost effectiveness for data plans or air cards, applicants must be able to either (1) demonstrate that installing a WLAN is not physically possible, or (2) provide a comparison of the costs to implement an individual data plan solution versus a WLAN solution.⁹ For the latter option, the cost comparison must validate that the data plans or air card solution was more cost effective than the WLAN solution.¹⁰ The Commission determined that, absent such a showing, individual data plans or air cards are ineligible for E-rate discounts.¹¹

4. USAC denied petitioners' applications for E-rate support for funding year 2015 for individual data plans or air cards for petitioners' staff members because petitioners could not show that installing a WLAN was impossible or that individual data plans or air cards were more cost effective than installing a WLAN and purchasing Internet access for use with the WLAN. Although petitioners style their filings as waiver requests, they also argue that the Commission's rules on cost effectiveness do not require them to compare the costs of a cellular data plan solution to the costs of a WLAN solution because public safety is at issue.¹² Petitioners further assert that the Communications Act, specifically section 254(c)(1), requires the Commission to support services that are essential to public safety and that

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Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *Id.*

⁵ See *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870, 8874, para. 6 (2014) (*First E-rate Modernization Order*).

⁶ *Id.* at 8898-8922.

⁷ *Id.* at 8933, para. 152.

⁸ *Id.* at 8933, para. 153.

⁹ *Id.* See also *Modernizing the E-rate Program for Schools and Libraries, Connect America Fund*, WC Docket Nos. 13-184 and 10-90, Second Report and Order and Order on Reconsideration, 29 FCC Rcd 15538, 15600-15601, paras. 156-159 (2014) (*Second E-rate Modernization Order*) (clarifying that applicants that seek funding for data plans or air cards for mobile devices should compare the costs of all components necessary to deliver connectivity to the end user device and that applicants may not consider whether they are likely to receive category two E-rate support when analyzing the cost-effectiveness of a data plan or air card solution).

¹⁰ *First E-rate Modernization Order*, 29 FCC Rcd at 8933, para. 153. See also *Second E-rate Modernization Order*, 29 FCC Rcd at 15601, para. 158.

¹¹ *First E-rate Modernization Order*, 29 FCC Rcd at 8933, para. 152.

¹² See, e.g., Batesville Community School Corporation Waiver Request at 2; Prince of Peace Catholic Schools Waiver Request at 2; Shelby Eastern Schools Waiver Request at 2.

E-rate must therefore support cellular data plans to provide school personnel an alternate way to communicate in an emergency that shuts down WLAN access to the Internet.¹³

5. Discussion. Based on the record and on the Commission's decision to limit the circumstances under which E-rate support is available for individual data plans or air cards, we deny the Waiver Requests. The Commission may exercise its discretion to waive a rule where the particular facts demonstrate that (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.¹⁴ Petitioners have not met either prong of the waiver standard.

6. Petitioners do not claim that they are faced with special circumstances that warrant a deviation from the cost effectiveness analysis required by the Commission in order to receive E-rate support for individual data plans or air cards. Instead, petitioners seek E-rate support for individual data plans and air cards based on public safety concerns that are general in nature. To warrant consideration for waiver, a petitioner must "articulate a specific pleading, and adduce concrete support, preferably documentary" and must "plead with particularity the facts and circumstances" which warrant the granting of the requested waiver.¹⁵ Petitioners make no such showings. Nor do petitioners offer a compelling explanation as to why Internet access via their WLANs will not meet their educational needs, which is the public interest at the heart of the E-rate program. Instead, petitioners agree that in everyday use, cellular data plans serve the same function as WLAN services, but that E-rate supported cellular data plans will help alleviate their concerns about public safety, in the event that a WLAN becomes non-functional.¹⁶

7. Moreover, because petitioners' concerns are generalized, granting these waivers would likely lead to similar waiver requests from schools and libraries across the country and would result in the Universal Service Fund (fund) spending substantial sums of money for services that petitioners concede are largely duplicative of WLAN services.¹⁷ Although the individual funding requests at issue in these petitions are not large, in the aggregate, granting waivers for the reasons presented in these petitions would be costly for the E-rate fund. The Commission is required to consider the impact of funding decisions on universal service, and it was appropriate for it to limit access to individual data plans and air cards in order to focus on providing funding for WLANs that provide educational benefits to all students and library patrons.¹⁸

8. Petitioners also argue that the E-rate program's requirements to perform a cost-effectiveness comparison with WLANs do not apply when applicants are seeking cellular data plans for key staff members for public safety assurances.¹⁹ Petitioners further argue that the Communications Act

¹³ See, e.g., Crown Point Community School Corporation Waiver Request at 2-3; Shelby Eastern Schools Waiver Request at 2-3; Greater Clark County School District Waiver Request at 2-3.

¹⁴ *Northeast Cellular*, 897 F.2d at 1166.

¹⁵ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, n.9 (D.C. Cir. 1969). The Commission "is not bound to process in depth what are only generalized pleas." *Id.*

¹⁶ See e.g., Batesville Waiver Request at 2; Crown Point Community School Corporation Waiver Request at 2; Jay School Corporation at 2.

¹⁷ In the *Seven School Districts Order*, the Common Carrier Bureau (now the Wireline Competition Bureau) explained that it "must consider carefully the consequences of making exceptions to rules designed to provide predictability" and in considering the waiver petitions before it, the Bureau must "take into account the impact on universal service if other school districts in the United States requested similar relief" for parties with the same or similar characteristics. *Seven School Districts Order*, 13 FCC Rcd at 24974, para. 15.

¹⁸ See 47 U.S.C. § 254(h)(2)(A) (authorizing the Commission to establish competitively-neutral rules—"to enhance, to the extent technically feasible and *economically reasonable*, access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers, and libraries.") (emphasis added).

¹⁹ See, e.g., Prince of Peace Catholic Schools Waiver Request at 2; Shelby Eastern Schools Waiver Request at 2.

requires the Commission to provide E-rate discounts for communications services that are essential for public safety.²⁰ While we are sympathetic to the petitioners' desire to put in place robust and even redundant communications plans in the event of a public safety incident, we find these arguments to be misplaced and untimely.

9. The Commission has the authority to determine what services are eligible for support and under what circumstances.²¹ The Commission did not create an exception to the requirements it articulated in the *First E-rate Modernization Order* for funding data plans for a limited number of staff or administrative cellular users. Moreover, while the Communications Act identifies public safety as one of the factors to weigh in designating supported services, it does not require that the fund support all services that could further public safety without taking other factors and program goals into account.²²

10. Like all stakeholders, petitioners had a full and fair opportunity during the E-rate Modernization proceeding to advocate for the Commission to continue to provide E-rate support for individual data plans. In the *E-rate Modernization NPRM*, the Commission sought comment on whether it should phase out support for cellular data plans and air cards, because such services are costly and broadband services can be provided more efficiently through a local area network.²³ In the *First E-rate Modernization Order*, the Commission found that many of the services for which it eliminated funding, including individual cellular data plan services, are "important, but not essential to education, and E-rate funding is not sufficient to support these services at the risk of not being able to fund the services identified herein that advance our program goals."²⁴ To the extent the petitioners are asking the Commission to reconsider the decision it made in the *First E-rate Modernization Order*, the deadline to file a Petition for Reconsideration of that order has long passed.

11. For the reasons explained above, we find denying the Waiver Requests and upholding USAC's application of the cost-effectiveness analysis required by the Commission for schools and libraries seeking support for individual data plans and air cards is consistent with the public interest in these instances because it helps preserve the universal service fund, ensures the fair distribution of E-rate discounts to schools and libraries,²⁵ and guards against waste, fraud, and abuse in the E-rate program.²⁶

²⁰ See, e.g., Crown Point Community School Corporation Waiver Request at 2-3; Shelby Eastern Schools Waiver Request at 2-3; Greater Clark County School District Waiver Request at 2-3.

²¹ The Commission determined that nothing in section 254(c)(1) or elsewhere bars it from establishing different supported services for different elements of the overall fund and reversed those decisions, to the extent they exist, that could be read to take a different view of its ability to adopt different definitions of supported services for different elements of the overall fund under 254(c)(1). *First E-rate Modernization Order*, 29 FCC Rcd at 8896-97, paras. 70-74, and para. 72 n.155 (2014).

²² The Commission has held that all of the section 254(c)(1)(A)-(D) criteria need not be met; they merely must be considered. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8809, para. 61 (1997) (subsequent history omitted) (finding that all four criteria enumerated in section 254(c)(1) must be considered, but not each necessarily met, before a service may be included within the general definition of universal service, should it be in the public interest). The Commission also interpreted the statutory language, particularly the word "consider," as providing it flexibility to establish a definition of services to be supported, after it considers the criteria enumerated in section 254(c)(1)(A)-(D). *Id.*

²³ *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Notice of Proposed Rulemaking, 28 FCC Rcd 11304, 11334, para. 102 (2013) (*E-rate Modernization NPRM*). Some commenters in the proceeding argued that cell phone service should be allowed for administrators and mobile employees but cellular data plans should not be allowed, while others claimed there can be some justification for data plans on cell phones for administrators provided that the plans are minimal. See *First E-rate Modernization Order*, 29 FCC Rcd at 8926-27, para. 141, n.331.

²⁴ *First E-rate Modernization Order*, 29 FCC Rcd at 8928, para. 144.

²⁵ See, e.g., *First E-rate Modernization Order*, 29 FCC Rcd at 8913, para. 111.

12. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291, 1.3 and 54.722(a) of the Commission's rules, 47 CFR §§ 0.91, 0.291, 1.3 and 54.722(a), the Requests for Waiver filed by the petitioners listed in the APPENDIX are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ryan B. Palmer
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

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²⁶ See, e.g., *First E-rate Modernization Order*, 29 FCC Rcd at 8932, para. 151 n.359; 29 FCC Rcd at 8974, para. 261.

APPENDIX
Requests for Waiver

Petitioner	Application Numbers	Funding Year(s)	Date Request for Waiver Filed
Batesville Community School Corporation Batesville, Indiana	1019403	2015	Aug. 17, 2015
Crothersville Community Schools Crothersville, Indiana	1017280	2015	Aug. 18, 2015
Crown Point Community School Corporation Crown Point, Indiana	1008810	2015	Oct. 9, 2015
Delaware Community School Corporation Muncie, Indiana	999501	2015	Aug. 17, 2015
Greater Clark County School District Jeffersonville, Indiana	1021645	2015	Oct. 9, 2015
Jay School Corporation Portland, Indiana	1019593	2015	Sept. 9, 2015
Northeastern Wayne School Corporation Fountain City, Indiana	1019805	2015	Sept. 9, 2015
Old National Trail Special Services Cooperative Greencastle, Indiana	1033248	2015	Oct. 9, 2015
Oldenburg Academy of the Immaculate Conception Oldenburg, Indiana	1019777	2015	Sept. 9, 2015
Our Lady of Providence School Clarksville, Indiana	1019789	2015	Sept. 9, 2015
Prince of Peace Catholic Schools Madison, Indiana	1025463	2015	Nov. 5, 2015
Randolph Southern School Corporation Lynn, Indiana	1023298	2015	Sept. 9, 2015
School City of Hobart Hobart, Indiana	1006715	2015	Aug. 13, 2015
Shelby Eastern Schools Shelbyville, Indiana	1021002	2015	Oct. 19, 2015
Sturgis Public School District Sturgis, Michigan	1005454	2105	Oct. 9, 2015
Vigo County School Corporation Terre Haute, Indiana	1022111	2015	Sept. 9, 2015
Washington Community Schools, Inc. Washington, Indiana	1021098	2015	Sept. 9, 2015