



December 13, 2010

Via Electronic Filing

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Ex Parte Notice
CC Docket Nos. 02-6, 09-51
Schools and Libraries Universal Service Support Mechanism
A National Broadband Plan for Our Future

Dear Ms. Dortch:

On September 29, 2010, members¹ of the State E-Rate Coordinators Alliance (SECA) met with Gina Spade and Regina Brown, and submitted the attached list of questions seeking clarification of FCC 10-175, Sixth Report and Order released on September 28, 2010. On October 13, 2010 SECA submitted a supplemental list of questions concerning the gift restriction rules in the Sixth Report and Order that are also attached.

Respectfully submitted,

/s/ Gary Rawson
Gary Rawson, Chair
State E-rate Coordinators Alliance
Mississippi Department for Information Technology Services
301 North Lamar Street, Suite 508
Jackson, Mississippi 39201
601-359-2613
gary.rawson@its.ms.gov

Enclosures

¹ Gary Rawson, Julie Tritt Schell, Becky Rains, Patricia Dalton, Dan Farslow, Valerie Oliver, Jeannene Hurley, Debra Kriete, Sabrina Scott, Sabrina Carson, George McDonald, DeLilah Collins, Lorrie German, Cathey George, Win Himsworth, Bob Bocher, Valarie Byrd, Melinda Brereton, Michael Andrews, Caroline Wolf, Russ Selken, SuAnn Witt, Brett Himsworth, Barry Pace, Tom Bayersdorfer, Charlie Jackson, Brett Hinton, Carol Mosley, Chris Schneider, Ginnie Harwood, Greg Weisiger, Jennifer Van Orman, Jerome Browning, Shirley Bauer, Susan Tenkoff.

SECA Questions for FCC

September 29, 2010

FIBER

- Q1. If you are selecting a non telecom provider, but you're not applying for discounts on internet services, does the applicant still need to comply with CIPA.
- Q2. Are the modulating electronics needed to light the dark eligible for P2?
- Q3. Can an applicant apply for dark fiber in either telecom or internet access category?
- Q4. If you lease fiber from an ineligible telecom provider, can that fiber now be used for voice, data and video?
- Q5. Can you please clarify what is eligible and what is not in terms of what is eligible for dark fiber?
- Q6. Can the dual-role ESA guidelines be expanded to include state entities (that may want to be a fiber vendor and also an applicant).

OFFSITE WIRELESS ACCESS

- Q7. Do you have a timeline for the competitive grant program?
- Q8. Do the entities applying for the pilot program need to have a technology plan?

TECHNOLOGY PLANS

- Q9. Paragraph 66. We believe the Order was intending to provide relief to applicants so they don't need to have a "written" technology plan when you post the 470 if you already have an approved plan in place. But unfortunately the Order and rules don't support this intent.
- Q10. Order states that it is effective 30 days after publication in FR. Because this will create two different set of rules (one for applicants that submit 470's now and one for applicants submit 470's after the effective date), would it be possible to waive the tech plan requirement for all FY 2011 applications?
- Q11. Will the draft 470 be amended to make changes to the tech plan certification or do you feel the changes embedded in the draft form will satisfy the new changes?

UNIQUE POPULATIONS

- Q12. Can you give us a sense of why the new allowances for services to residential and NIF facilities of entities that serve unique populations require a 35%+ NSLP eligibility rate?

COMPETITIVE BIDDING PROHIBITIONS

Q13. We believe the language in the Order is so broad that it restricts any vendor with a SPIN from providing gifts to any school or library at any time -- whether or not the vendor is providing services to the applicant and whether or not the applicant is requesting discounts on those services. Is this true?

Q14. How can we ensure that ESAs, IUs, BOCES, etc are not adversely affected by this new rule?

SPIN CHANGE

Q15. What happens if no other bids were received? Or if the next lowest bidder was not selected because of reasons unrelated to cost?

Q16. Is the SPIN change requirement only applicable to contracted services (and not for month-to-month services)?

Q17. SPIN changes are often needed due to services not being installed by July 1, so applicants need to do a Split FRN SPIN Change so they can obtain funding for the months under the old service provider, and the months under the new contract. The new rules do not anticipate this type of special SPIN change. Would it be possible for this type of special SPIN change to be addressed by USAC and special procedures addressed?

OTHER

Q18. Will another NPRM be issued in 2011 that will deal more specifically with discount calculations and P2 funding?

Q19. Do you know when the competitive bid initiative will begin? Is this the program that will allow for the "school spots" as was listed in the press release?

Q20. Can you give us some sense when the flash cut will be done on the 470? Can we have a brief overlap for transition, particularly for paper applications?

Q21. Will the new 471 be available for the FY2011 application window?

Q22. We are extremely concerned that there will be an attempt by USAC to push the 471 window close to January instead of the second week in February. It is extremely important that the window close date not be moved to January, particularly because it would move the 470 deadline to the end of December (during the holidays), and in light of the changes to the forms this year.

Q23. The Form 471 draft instructions indicate that the Item 21 attachments will be due before the close of the window. As we mentioned in our comments, we can support a date certain that the Item 21's are due (such as 2 - 3 weeks after the window close), but to have them due on the window close date is unworkable. The USAC servers will not support that much traffic on the system, but most importantly, applicants are negotiating and signing contracts and completing the Form 471 until the final day of the window and it is not realistic to have the Item 21's completed on the same day.

**Gift Rule Clarifications
Offered by SECA
October 13, 2010**

In an effort to provide more clarity to the E-rate gift rules, SECA respectfully submits these questions and examples to the FCC for discussion and clarification.

A) SECA Interpretation of 6th Report and Orderⁱ: Does the FCC agree with this summary?

Items prohibited from being provided by a service provider to an applicant: any gift, gratuity, favor, entertainment, loan, or any other thing of value from a service provider participating in or seeking to participate in the schools and libraries universal service program.

Exceptions: Modest refreshments not offered as part of a meal, items with little intrinsic value intended solely for presentation, and items worth \$20 or less, including meals, may be offered or provided, and accepted by any individuals or entities subject to this rule, if the value of these items received by any individual does not exceed \$50 from any one service provider per funding year.

Individuals subject to these rules:

Applicants: all individuals who are on the governing boards of such entities (such as members of a school committee), and all employees, officers, representatives, agents, consultants or independent contractors of such entities involved on behalf of such school, library, or consortium with the Schools and Libraries Program of the Universal Service Fund (E-rate Program), including individuals who prepare, approve, sign or submit E-rate applications, technology plans, or other forms related to the E-rate Program, or who prepare bids, communicate or work with E-rate service providers, E-rate consultants, or with USAC, as well as any staff of such entities responsible for monitoring compliance with the E-rate Program.

Service Providers: all individuals who are on the governing boards of such an entity (such as members of the board of directors), and all employees, officers, representatives, agents, or independent contractors of such entities.

When: Once a relationship between an applicant and service provider has been established, the rules are in effect at all times. The rules also apply to all participating parties when there are pending E-rate procurements. If an applicant that participates in E-rate and a service provider that participates in E-rate do not currently have a relationship and there is no E-rate procurement currently being conducted in which the service provider is seeking to participate, these restrictions do not apply.

B) Definition of Gift:

The 6th Report and Order does not include a specific definition of "gift." However, the gift rules applicable to federal agencies do contain a definition that should be incorporated by reference 5 C.F.R. § 2635.203(b). SECA requests the FCC clarify in writing that the following federal definition of gifts hereby applies to the E-rate gift rules.

(b) *Gift* includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of training, transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred. It does not include:

(1) Modest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal;

- (2) Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation;
- (3) Loans from banks and other financial institutions on terms generally available to the public;
- (4) Opportunities and benefits, including favorable rates and commercial discounts, available to the public or to a class consisting of all Government employees or all uniformed military personnel, whether or not restricted on the basis of geographic considerations;
- (5) Rewards and prizes given to competitors in contests or events, including random drawings, open to the public unless the employee's entry into the contest or event is required as part of his official duties;
- (6) Pension and other benefits resulting from continued participation in an employee welfare and benefits plan maintained by a former employer;
- (7) Anything which is paid for by the Government or secured by the Government under Government contract;

C) Violations

- (1) Can an employee recuse themselves from the e-rate/procurement process if they discover that they are in violation?
- (2) If there is a prohibited gift accepted in violation of the E-rate gift rules, can the affected person recuse himself from any involvement with E-rate in order to cure the problem? Or should the person instead follow the provisions of 5 C.F.R. Section 2635.205 to cure the problem?

Sec. 2635.205 Proper disposition of prohibited gifts.

(a) An employee who has received a gift that cannot be accepted under this subpart shall, unless the gift is accepted by an agency acting under specific statutory authority:

- (1) Return any tangible item to the donor or pay the donor its market value. An employee who cannot ascertain the actual market value of an item may estimate its market value by reference to the retail cost of similar items of like quality. See Sec. 2635.203(c).

D) The following are examples of various gift situations and SECA's interpretation of whether they violate the new gift rules. Can the FCC comment whether the new FCC regulation 54.111(d) has been applied correctly to these situations?

Example 1: A state agency is responsible for providing E-rate training. The agency provides training throughout the state and offers the training to any school, any library, any consultant, and any service provider. There is no fee charged for the training. The service providers attend all training sessions because they want to learn from the training and they want to meet their customers. Service providers that choose to (voluntarily) are allowed to pay for the meals and for the meeting rooms. The service providers pay the conference center for the meeting rooms and the meals directly. The applicants are not aware of which service provider pays for any

particular meal or meeting room. There is no publicity advertising the service provider's financial support of the training costs.

Violation: No

Comment: This is a widely-attended gathering as permitted and defined under 5. C.F.R. §2635.305(g)(2), open to anyone who wishes to attend. Additionally, E-rate training is such a critically important function that even if the session does not qualify as a widely-attended gathering that there should be an explicit clarification that E-rate training sessions are not subject to the gift restrictions.

Further, even if it was announced that the service providers contributed to the financing of the meeting room and meal costs, this would not be considered a violation of FCC rules.

Example 2: A national organization is having its annual conference. One evening during the conference a service provider takes his customers to dinner. The service provider does not pay for alcoholic drinks, but does pay for dinner. The menu price for each meal exceeds \$20 per person.

Violation: Yes

Comment: The cost of the meal exceeds \$20 and there is a direct connection between the gift (meal) and the service provider.

Example 3: A national organization is having its annual conference. The organization charges a fee for all attendees, including service providers. Each meal is provided by the organization.

Violation: No

Comment: This is a widely-attended gathering and all fees are used to pay for all meals. No meal is attributed to a single service provider. In addition there is no gift situation because the conference charges a fee to all attendees to cover these costs.

Example 4: A national organization is having its annual conference. One evening a service provider hosts a Super Bowl party that includes free drinks and heavy Hors d'oeuvres advertised as the (service provider) Super Bowl Party.

Violation: No

Comment: This is a widely-attended gathering and the Super Bowl party is considered an "Activity Collateral to Another Event. Events which are part of the meeting but supported by other organizations are not considered separate events. Therefore, it qualifies under the same rules as #3 above.

Example 5: An organization is holding a technology conference. The conference is open to all school teachers and technology coordinators. There is no fee for the conference. Service providers are allowed to have booths at

the conference but are required to pay a booth fee. In an attempt to encourage attendees to visit the service provider booths the organization accepts door prizes from the service providers. Each door prize has the service provider's name on the prize. The value of each prize exceeds \$20. The winners are selected by random drawing.

Violation: No

Comment: This is a widely-attended gathering. The drawings for the prizes are open to all attending the conference. Also this is subject to the exclusion for "Rewards and prizes given to competitors in contests or events, including random drawings, open to the public unless the employee's entry into the contest or event is required as part of his official duties."

Example 6: A 100 person conference for school district CIOs is held annually and requires that participants be the CIO or Technology Coordinator of their district to attend. A large national telecommunications vendor is sponsoring a portion of the conference costs. The vendor was (is) a bidder in many the district's E-Rate application processes and provides service for some. The conference includes lunch, which is less than \$20.

Violation: No

Comment: The Gift of lunch is less than \$20.

Example 6.1 What if lunch were more than \$20?

Violation: Yes

Comment: The \$20 limit for Gifts has been exceeded.

Example 7: A service provider wants to demonstrate a new product or service. The service provider sends out invitations to school tech coordinators, consultants for the schools, and the technical staff of state agencies. The demonstration is labeled a "Lunch and Learn." Breakfast and lunch are provided.

Violation: Yes

Comment: The value of the meals exceeds \$20.

Example 8: A natural disaster (Katrina, Iowa Floods, California Fires) destroys school infrastructure and equipment. Service providers offer their assistance by donating equipment, material, labor, and money.

Violation: No

Comment: Paragraph 90 of the Order applies: "The rule we articulate today does not discourage companies from making charitable donations to E-rate eligible entities in the support of schools – including, for example, literacy programs, scholarships, and capital improvements – as long as such contributions are not directly or indirectly related to E-rate procurement activities or decisions."

Surely, natural disasters would qualify as an exemption.

Example 9: A vendor sponsors a nationwide training for all school customers that use are planning to use their software or hardware. The school pays for the travel to the training and all meals. There is no cost for the training.

Violation: No

Comment: The value of training is not considered a gift.

Language from the Sixth Report and Order

87. In addition to this precedent, we address the receipt of gifts by applicants from service providers and potential service providers under the E-rate program. As noted above, the Commission's rules and precedent require that applicants conduct a fair and open competitive bidding process. In addition, applicants are required to certify on the FCC Form 471 that they have not received anything of value or a promise of anything of value other than the services and equipment requested on the form. In the *NPRM*, we listed gift-giving as one example of prohibited conduct under a fair and open competitive bidding process.

88. We find that the best approach is to make gift rules under the E-rate program consistent with the gift rules applicable to federal agencies, which permit only certain *de minimis* gifts. Generally, the federal rules prohibit a federal employee from directly or indirectly soliciting or accepting a gift (*i.e.*, anything of value. For example, prohibited *gifts would include meals, tickets to sporting events, or trips.*) from someone who does business with his or her agency or accepting a gift given as a result of the employee's official position. The federal rules do, however, permit two categories of circumscribed *de minimis* gifts: (1) modest refreshments that are not offered as part of meal (*e.g.*, coffee and donuts provided at a meeting) and items with little intrinsic value intended for presentation (*e.g.*, certificates and plaques); and (2) items that are worth \$20 or less (*e.g.*, pencils, pens, hats, t-shirts, and other items worth less than \$20, including meals), as long as those items do not exceed \$50 per employee from any one source per calendar year. Similarly, the rule we adopt today also allows such *de minimis* gifts. In determining the amount of gifts from any one source, we will consider the aggregate value of all gifts from any employees, officers, representatives, agents, independent contractors, or directors of the service providers. We note that the restriction on gift always applicable, and is not in effect or triggered only during the time period when the competitive bidding process is taking place. Based on our experience, gift activities that undermine the competitive bidding process may occur outside the bidding period. Accordingly, we amend section 54.503 of our rules to prohibit E-rate applicants from soliciting or accepting any gift or other thing of value from a service provider participating in or seeking to participate in the E-rate program. We further amend that rule to make it a violation for any service provider to offer or provide any gift or other thing of value to those personnel of eligible entities involved with the E-rate program. Like the federal rules, we include an exception for gifts to family and personal friends when those gifts are made using personal funds of the donor (without reimbursement from an employer) and are not related to a business transaction or business relationship.

89. We find that the federal rules offer a fair balance between prohibiting gifts that might have undue or improper influence on a procurement decision and acknowledging the realities of professional interactions, which might occasionally involve giving people coffee or other modest refreshments or a token gift. Moreover, the federal rules are well-established and have been interpreted frequently, and parties can look to these decisions if there are questions about the propriety of a particular offering. In addition, we find that this rule is appropriate for ease of administration and also to provide clarity for service providers and applicants. Finally, we emphasize again that

schools, libraries, and service providers remain subject to applicable state and local restrictions regarding gifts. Thus, to the extent a state or local provision is more stringent than the federal requirements, violation of the state or local provision constitutes a violation of the Commission rule we adopt herein.

(Footnotes deleted).

The Rule (page 57 of the Order)

47 C.F.R. §54.511

(d) Gift Restrictions.

(1) Subject to subparagraphs (3) and (4) of this paragraph, an eligible school, library, or consortium that includes an eligible school or library may not directly or indirectly solicit or accept any gift, gratuity, favor, entertainment, loan, or any other thing of value from a service provider participating in or seeking to participate in the schools and libraries universal service program. No such service provider shall offer or provide any such gift, gratuity, favor, entertainment, loan, or other thing of value except as otherwise provided herein. Modest refreshments not offered as part of a meal, items with little intrinsic value intended solely for presentation, and items worth \$20 or less, including meals, may be offered or provided, and accepted by any individuals or entities subject to this rule, if the value of these items received by any individual does not exceed \$50 from any one service provider per funding year. The \$50 amount for any service provider shall be calculated as the aggregate value of all gifts provided during a funding year by the individuals specified in subparagraph (2)(ii).

(2) For purposes of this paragraph:

(i) the terms “school, library, or consortium” include all individuals who are on the governing boards of such entities (such as members of a school committee), and all employees, officers, representatives, agents, consultants or independent contractors of such entities involved on behalf of such school, library, or consortium with the Schools and Libraries Program of the Universal Service Fund (E-rate Program), including individuals who prepare, approve, sign or submit E-rate applications, technology plans, or other forms related to the E-rate Program, or who prepare bids, communicate or work with E-rate service providers, E-rate consultants, or with USAC, as well as any staff of such entities responsible for monitoring compliance with the E-rate Program;

(ii) the term “service provider” includes all individuals who are on the governing boards of such an entity (such as members of the board of directors), and all employees, officers, representatives, agents, or independent contractors of such entities.

(3) The restrictions set forth in this paragraph shall not be applicable to the provision of any gift, gratuity, favor, entertainment, loan, or any other thing of value, to the extent given to a family member or a friend working for an eligible school, library, or consortium that includes an eligible school or library, provided that such transactions (i) are motivated solely by a personal relationship, (ii) are not rooted in any service provider business activities or any other business relationship with any such eligible school, library, or consortium, and (iii) are provided using only the donor’s personal funds that will not be reimbursed through any employment or business relationship.

(4) Any service provider may make charitable donations to an eligible school, library, or consortium that includes an eligible school or library in the support of its programs as long as such contributions are not directly or indirectly related to E-rate procurement activities or decisions and are not given by service providers to circumvent competitive bidding and other E-rate program rules, including those in section §54.503(c)(2)(vi), requiring schools and libraries to pay their own non-discount share for the services they are purchasing.

Existing Certifications on the Current Forms:

Certification on the Form 470

Additionally, you certify that the entities listed on this application have not received or a promise of anything of value, other than services and equipment sought by means of this form, from the service provider, or any representative or agent thereof or any consultant in connection with this request for services. See 47 C.F.R. Sec. 54.504 (c)(1).

Certification on the Form 471

Additionally, you certify that the Billed Entity has not received anything of value or a promise of anything of value, other than services and equipment requested under this Form 471, from the service provider(s), or any representative or agent thereof or any consultant in connection with this request for services.

Beginning with Funding Year 2001 (the Funding Year beginning July 1, 2001), if the Billed Entity who represents an Administrative Authority is applying for Internet Access or Internal Connections, the Administrative Authority must certify on a Form 479 that it is in compliance with the requirements of CIPA or that it is undertaking such actions to comply with the requirements of CIPA prior to the start of the following Funding Year. (If the Administrative Authority is the Billed Entity, the Administrative Authority will certify on the Form 486.) The Billed Entity must receive your completed and signed Forms 479 before it can complete and postmark its Form 486. If the Billed Entity is applying only for Telecommunications Services, the requirements of CIPA do not apply and the Billed Entity is not required to collect Forms 479. (For more information, see the Children's Internet Protection Act, as codified at 47 U.S.C. § 254(h) and (l).)