



July 13, 2023

Marlene H. Dortch, Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: Notice of *Ex Parte* Meeting on July 11, 2023

*Improving the E-Rate Rules and Processes for Tribal Applicants;
Modernizing the E-Rate Program for Schools and Libraries,
WC Docket No. 13-184*

Federal-State Joint Board on Universal Service, CC Docket No. 96-45

*Changes to the Board of Directors of the National Exchange Carrier Association, Inc.,
CC Docket No. 97-21*

Draft Report and Order and Further Notice of Proposed Rulemaking,
FCC-CIR2307-01

Dear Secretary Dortch:

On July 11, 2023, SECA members Debra Kriete and Julie Tritt Schell met virtually with Kate Dumouchel, Gabriela Gross, Molly O’Conor and Johnny Roddy to discuss suggestions to clarify the language in the Draft Report and Order and Further Notice of Proposed Rulemaking, FCC-CIR2307-01 (“Draft Order”).

We commend the Commission for the draft Order because of the numerous simplification and streamlining measures it contains. These changes will provide needed clarity in program rules and remove complex nuances in the rules that tripped up applicants – especially those new to the E-Rate program. At the same time, all the existing protections against waste, fraud and abuse remain intact.

We recommend the following six modifications to the Draft Order. We also note where our position is the same as SHLB’s recommendations as set forth in their *ex parte* filing dated July 12, 2023 in the above captioned proceedings.

- 1. Provide immediate relief from invoice denials stemming from missing a ministerial deadline and expand the invoice related issues for comment in the Further Notice of Proposed Rulemaking.**

Paragraph 70 of the Draft Order, in the Further Notice of Proposed Rulemaking (“FNPRM”) grace period be implemented for automatic approvals of invoice deadline extension (“IDE”)

requests when submitted to USAC within 15 days after the original invoice deadline. Currently the administration of IDEs is punitive if the applicant did not seek an extension before the original invoice deadline. USAC has no authority to grant late filed IDE requests and the applicant must seek a waiver with the FCC. But unless the applicant can show “extraordinary circumstances” which is a very difficult, if not impossible, standard to meet, their IDE waiver request is denied. In the nine years since the codification of the invoice deadline hundreds of IDE waivers have been denied and applicants have forfeited receipt of their E-rate funding due to missing the deadline for seeking an IDE.

In order to grant immediate relief to applicants while the FNPRM is pending, SECA requests three revisions to the Draft Order:

- A. The Commission should immediately waive the current invoice deadline regulation, 47 C.F.R. §54.514(b), and direct USAC to automatically approve IDE requests and accept and review on the merits late filed invoices submitted within 15 days of the original invoice deadline.

Currently late filed invoices are subject to a “zero paid” BEAR notification letter. If a late invoice is filed within 15 days of the original deadline, the BEAR notification letter could be sent after the 15-day grace period which would deny the applicant the benefit of the grace period and require them to submit an IDE waiver request to the FCC. To reduce the burden on USAC, applicants and the FCC, USAC should be directed to accept these late invoices and review them on the merits and not issue zero paid BEAR notification letters.

- B. The Commission should immediately direct the Wireline Competition Bureau to review IDE waiver requests according to a public interest standard for which there are precedential decisions that pre-date the more stringent “extraordinary circumstances” review standard.

- C. The FNPRM should seek comment on the three initiatives listed above:

- (1) Modify the invoice regulation and require USAC to automatically approve IDE requests submitted within 15 days of the original invoice deadline.
- (2) Modify the invoice regulation and require USAC to process invoices on the merits when submitted within 15 days of the original deadline even if the applicant did not first seek and receive an IDE.
- (3) Reinstate the public interest standard for reviewing IDE waivers.

Additional rationale:

Other areas of the E-Rate program offer flexibility for curing missed deadlines. The invoice deadlines should be similarly aligned with the rest of the program.

- For Form 486, USAC is required to notify applicants and provide an additional 15 days to file the Form 486 and cure the missed deadline.

- If applicants miss the Form 471 deadline, they can seek a waiver of the deadline if they file their Form 471 within 14 days of the deadline.
- Missed PIA deadlines that may result in funding denials are typically rescinded when the applicant appeals to USAC and explains why the deadline was missed.
- Waivers of late filed service delivery deadline extensions for non-recurring services are reviewed according to the public interest standard.

The Commission has on occasion waived its own regulations or policies prescribed in its orders when found to be in the public interest, while seeking comment on whether the waiver of the regulation or policy should be made permanent.

The Commission waived the prohibition against community use of E-Rate funded services while seeking comment on the prospect of permanently changing the regulation. In February 2010, in the E-rate Community Use Order and NPRM, on its own motion, the FCC waived sections 54.504(b)(2)(v) and 54.504(c)(1)(vii) of the existing rules, which required applicants to certify on their FCC Forms 470 and 471 that the services requested will be used solely for educational purposes. Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order and Notice of Proposed Rulemaking, 25 FCC Rcd 1740 (2010) (E-rate Community Use Order and NPRM); 47 C.F.R. §§ 54.504(b)(2)(v), 54.504(c)(1)(vii) (2009). The FCC extended this waiver through the close of funding year 2010 (June 30, 2011). The waiver allowed schools to open their facilities, when classes are not in session, to the general public to utilize services and facilities supported by E-rate. At the same time, the FCC also sought comment on whether to make this change permanent in a NPRM. Later, the change was ordered to be made permanently in Schools and Libraries Universal Service Support Mechanism, Sixth Report and Order, WC Docket No. 02-6, 25 FCC Rcd 18762, 18775-76, paras. 25-26 (2010).

The Commission waived the requirement for amortization of special construction charges over four years, on an interim basis, pending comment on whether to permanently rescind the four year special construction amortization requirement. In the Second 2014 Modernization Order, the Commission suspended temporarily the requirement to amortize special construction charges that were \$500,000 or more over a four year period. Modernizing the E-rate Program for Schools and Libraries, WC Docket No. 13-184, Second Report and Order and Order on Reconsideration, 29 FCC Rcd 15538 (19)(2014), paras. 17-21. The FCC then initiated a Notice of Proposed Rulemaking to eliminate the amortization requirement permanently, while the suspension of the requirement continued in effect. E-Rate Program Amortization Requirement, Notice of Proposed Rulemaking, 34 FCC Rcd 785 (4), WC Docket 19-2, FCC 19-5 (2019). In 2020 the Commission permanently eliminated the requirement. E-Rate Program Amortization Requirement, 35 FCC Rcd 672 (1), WC Docket No. 19-2, (2020).

SHLB also recommends these modifications to the Draft Order.

2. The Safe Harbor presumption for ineligible use should be defined to apply to all Category 1 data transmission and internet services.

In Paragraph 27 of the draft Order, the Commission proposes a 10% safe harbor for ineligible use of Internet service as long as at least 90% of requested Internet service is being used for eligible purposes. To ensure that all applicants can benefit from this provision, *all* Category 1 data transmission and internet services should be subject to the safe harbor presumption, not just Internet service. Internet service is procured sometimes as a stand alone service with the transmission service being separately purchased. In these instances, the ineligible services will traverse both the data transmission service and the internet service. Additionally, applying the Safe Harbor presumption to only a subset of Category 1 will further complicate the program at a time when the Commission is taking extraordinary steps to simplify it. Accordingly, it is necessary for the safe harbor presumption to apply to all Category 1 data transmission and/or internet services.

SHLB also recommends this modification to the Draft Order.

3. The ancillary ineligible uses identified in Paragraph 26 should include pre-kindergarten and adult education students.

In some states, pre-kindergarten and/or adult education is not included in the state's definition of elementary and/or secondary education, and therefore, services or equipment used by these learners is ineligible. Educating our early learners and providing additional training to our adult learners is part of the core mission of many K-12 schools, regardless of whether their state classifies these classes as K-12. These students should be included in the description of potentially ineligible uses that may benefit from the 90% safe harbor provision, in paragraph 26 of the Draft Order.

SHLB also recommends this modification to the Draft Order.

4. Expand the \$3,600 exemption from Category 2 funding requests to apply to schools.

In Paragraphs 19 and 20 of the Draft Order, the Commission adopts a competitive bidding exemption for all library applicants seeking support for category two equipment or services that total a pre-discounted amount of \$3,600 or less in a single funding year. We ask that the Commission extend this opportunity to schools (as well as libraries) under the same rules and guidelines. Small schools struggle with the complex E-rate competitive bidding rules and forms just the same as libraries, and so relief should be applied consistently to all applicants. We note that this item was not recommended previously by any party that submitted comments. If the Commission requires further evidence on record for this item, we ask that it implement this expansion on an interim basis and seek further comment in the draft FNPRM.

SHLB also recommends expanding this exemption to schools.

5. The definition of ancillary ineligible use in paragraph 29 should apply to switches and routers on the Eligible Services List.

In Paragraph 29 of the Draft Order, the Commission clarifies that cabling “drops” or “jacks” that are part of a local area network primarily serving an eligible purpose are eligible for E-Rate and do not require cost allocation. Further consideration of this issue has revealed that other types of equipment in addition to cabling, such as switches and routers with a primary eligible purpose, may connect to equipment that is ineligible for E-rate and be subject to the same cost allocation restrictions currently governing cabling. We are aware of audit findings that stated that switches may only be connected to eligible components to be fully eligible for E-Rate funding. SECA requests the Commission to apply the same cost allocation standards for cabling to any equipment (such as switches) that are primarily being used to provide broadband connectivity within schools and libraries where other, ineligible equipment is connected to it.

If the Commission believes it is necessary to gather more evidence in support of this request, we respectfully request that this issue be added to the FNPRM for further comment and record development.

SHLB also supports expanding the ancillary use exception to other equipment in the ESL such as switches.

6. Expand the FNPRM to seek comment on discount calculation issues.

There are three issues related to discount calculations that we request the Commission to include in the FNPRM.

- A. Five Year Discount Calculation: Since discounts do not vary widely from year to year, we believe that a simplification measure would be to allow applicants to validate their discounts once every five years, to coincide with the same five-year period governing the Category 2 budgets. Applicants should have the option of re-validating their discounts during the five year period but should not have to engage in this review annually if they are satisfied with the current discount calculation.
- B. Period of time for computing Community Eligibility Participation (“CEP”) Percentage: Currently and historically the data for computing discounts is based on current year data that will govern the upcoming funding year. However, USAC is now requiring applicants in the final year of their CEP cycle to certify they will be using a CEP grace year for the upcoming school year. We ask the FNPRM to seek comment on the applicable time period for computing discounts based on CEP and other NSLP data, and related to item A above, how many years may an applicant rely on the data to validate their discount calculations.

- C. How should states and schools in states with statewide CEP or statewide free lunch for all calculate their NSLP numbers for purposes of E-Rate discounts? Since they may not collect NSLP information based on the income level of each student's family what information is required to validate the school discount calculations?

SHLB did not address these recommendations.

Finally, we are aware that SHLB has requested the FNPRM to be expanded to seek comment on whether the Category 2 application deadline ought to become a rolling deadline rather than continue as a fixed deadline. We strongly prefer that the application process for Category 2 not be disrupted and changed during the middle of the existing cycle. In the past SECA has not taken a position on this issue.

We anticipate the Commission will release a public notice or NPRM sometime in the next year for Category 2 budgets for the next five year service period that begins July 1, 2026. The new or updated rules will need to be enacted by July 1, 2025 which is when the procurement period for FY 2026 will commence. We believe it would be most efficient for the Commission to address any Category 2 application process changes as part of that proceeding. Please let me know if there are any questions.

Respectfully submitted,



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