

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

In the Matter of)
)
Schools and Libraries Universal) CC Docket 02-6
Service Support Mechanism)
)

REPLY COMMENTS OF PHILIP B. GIESELER
on the
PETITION FILED BY THE STATE E-RATE COORDINATORS ALLIANCE
SEEKING CLARIFICATION REGARDING THE ELIGIBILITY OF BUNDLED END
USER EQUIPMENT UNDER THE SCHOOLS AND LIBRARIES PROGRAM

In response to a Petition for Clarification by the State E-rate Coordinators Alliance (SECA), the Commission is evaluating whether additional specificity or requirements are necessary in order to clarify what has become known as the “Free Handset” or “Free Cell Phone” policy.¹ SECA is to be commended for putting this issue more directly in front of the Commission, as is the Commission for promptly seeking comments on the Petition in order to consider clarification for what has been a confusing area for USAC, applicants, and service providers.

These Reply Comments are submitted by Philip B. Gieseler, an independent E-rate consultant with past work experience at the FCC, as President of a network engineering company, and with USAC. That background provides a wide perspective for evaluating both marketplace realities and

¹ The term “Free Cell Phone” policy will be used in these comments. See Public Notice, CC Docket No. 02-6, Wireline Competition Bureau Seeks Comment on a Petition Filed by the State E-Rate Coordinators’ Alliance Seeking Clarification regarding the Eligibility of Bundled End User Equipment under the Schools and Libraries Program, DA 12-1325 (Released Aug. 10, 2012), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0810/DA-12-1325A1.pdf.

necessary regulatory requirements. The Reply Comments provided here are submitted as an individual and not on behalf of any E-rate constituent.

Three points are made here, two that are germane to the immediate issue and one—the most important—relevant to a broader, long range view about how the Commission should be addressing E-rate eligibility issues in the most effective manner going forward.

The Commission is urged to take prompt action on the Petition.

The Commission's prompt request for comments to the SECA petition raises the possibility that it may attempt to release clarifying information in conjunction with the next Eligible Services List (ESL). Such a prompt resolution would be highly desirable.

USAC appears uncertain how to administer the Commission's new policy. It has submitted a letter to the Commission seeking further guidance.² Thus far, they have been unable to provide specific information in response to questions received regarding the policy.³ Additionally, USAC appears to be holding without action funding requests that are consistent with the policy.⁴

² See Letter from Mel Blackwell, Vice President, Schools and Libraries Division, to Sharon Gillett, Chief, Wireline Competition Bureau, "Request for Guidance on Rules Governing Gifts in the E-rate Program," CC Docket No. 02-6 (filed Aug. 5, 2011), available at <http://apps.fcc.gov/ecfs/document/view?id=7021700625>.

³ For example, a question submitted for USAC's September 7, 2011 Service Provider Conference call requested more specific information about when the Free Cell Phone policy was applicable. USAC was able to respond only that FCC Orders should be reviewed. See the USAC call minutes at http://usac.org/_res/documents/sl/pdf/conference-calls/2011/09-2011-SL-Minutes.pdf (question 4).

⁴ See comments submitted by Jive Communications, Inc. to this proceeding (filed September 10, 2012), available at <http://apps.fcc.gov/ecfs/document/view?id=7022011187>. (Jive Comments)

E-rate constituents likewise need clarification. Even while USAC appears to have uncertainty how to administer the Free Cell Phone policy, they have modified the Free Services Advisory to specify the policy as an acceptable approach.⁵ Thus, while some beneficiaries who are fully versed in the difficulties and complexities of E-rate have taken a “wait and see” approach toward the policy, other beneficiaries have interpreted the straightforward wording of the Commission, as posted on the USAC website, at face value. All beneficiaries deserve clear, bright line information about what can be a part of an eligible funding request. If the Commission addresses this issue promptly, perhaps in conjunction with release of the next Eligible Services List, applicants and service providers could proceed with an improved understanding as they actively prepare for the next fund year.

The Commission may wish to consider one minor clarification to its Free Cell Phone policy.

Suggestions for clarifying the Free Cell Phone policy vary from SECA’s highly specific four-point approach to the comments of Fund for Learning that the current policy is clear and need not be clarified.⁶

⁵ See “Free Services Advisory” published by USAC at <http://usac.org/si/applicants/step02/free-services-advisory.aspx> which states in part:

A cost allocation is not required when the free product or service is available to the public or a class of subscribers broader than just E-rate recipients. For example, many cell phones are free or available at discounted prices with the purchase of a two-year service contract. Applicants are free to take advantage of these deals without cost allocation, but cannot accept other equipment with service arrangements that are not otherwise available to some segment of the public or class of users.

⁶ See State E-Rate Coordinators Alliance, Petition for Clarification Pertaining to the Eligibility of Free VoIP Handsets and Other End-User Equipment, CC Docket No. 02-6, GN Docket No. 09-

Should the Commission determine that clarification is appropriate, a single point may be sufficient, as follows:

The specific package remains the most cost-effective means of receiving the eligible services, without regard to the value of the ineligible functionality.

This suggestion is consistent with SECA's first point. The wording is drawn directly from the Commission's current rule for Ancillary Service.⁷ No other requirement appears necessary.⁸

Regarding additional suggestions by SECA, the Commission should not inhibit an active marketplace that is making ever-changing innovations and improvements. E-rate applicants should be able to take advantage of the same marketing programs and technical configurations as any other organization, both now and in the future.⁹

51 (filed July 27, 2012), available at <http://apps.fcc.gov/ecfs/document/view?id=7021994581>. (SECA Petition) See Comments of Funds for Learning, LLC on the Petition Filed by the State E-rate Coordinators Alliance Seeking Clarification Regarding the Eligibility of Bundled End User Equipment Under the Schools and Libraries Program (filed September 7, 2012) available at <http://apps.fcc.gov/ecfs/document/view?id=7022009805>. (Funds for Learning Comments)

⁷ See Title 47 of the Code of Federal Regulations, part 54.504(e)(2) available at <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr;sid=4736408122c14ffeafe5ab292f2fa56a;rgn=div8;view=text;node=47%3A3.0.1.1.7.6.4.5;idno=47;cc=ecfr>

⁸ Should the Commission adopt this requirement it should also clarify a point of potential confusion. The USAC website indicates that ineligible components can be considered as one of the evaluation factors (though price of eligible components must be the highest-weighted factor). (See "Construct an Evaluation" at <http://www.usac.org/sl/applicants/step03/evaluation.aspx>.) If the Commission adopts the "most cost effective" requirement for the Free Cell Phone policy, it should clarify whether or not the ineligible components can be considered as an additional evaluation factor. If they cannot, then clear information to this effect should be provided on the USAC website.

⁹ In particular, some technology companies as a goodwill and public relations gesture provide highly advantageous programs to educational organizations (whether or not they are E-rate applicants). Such current and future programs, if anything, should be encouraged by the Commission, not discouraged, as they are consistent with Universal Service objectives.

SECA's fourth suggestion is that the configuration with free or reduced-cost ineligible components should not be more expensive than the same offering without the ineligible components. This suggestion appears helpful at first reading, but that would be the case only if such a clarification does not impact prompt determinations of funding requests. If Commission concurrence with SECA's fourth suggestion was interpreted by USAC as requiring additional scrutiny regarding pricing issues, even when there is no indication of non-compliance, then additional requirements in this area should be avoided.

In this regard, expanding on comments by Jive Communications and Sprint Nextel, implementation of SECA's fourth suggestion could result in myriad confusion given the wide variety of technical configurations, and therefore pricing, provided to applicants with unique and varying needs.¹⁰ On balance, the original specification of the Commission's Free Cell Phone policy appears sufficient to administer any obvious cases where improper subsidization is taking place.

The E-rate marketplace deserves clearly stated Commission rules and policies. In the case of the Free Cell Phone policy, that can be achieved by either reaffirmation of the policy as originally stated or further clarification that specifies common-sense requirements that are not onerous. Additionally,

¹⁰ See Jive Comments at p. 12-13 ("Jive generally agrees with [SECA's fourth suggestion] but would urge the Commission to make clear that it applies only across similarly situated customers.") See also Comments of Sprint Nextel Corporation (filed September 10, 2012), p. 3-4, available at <http://apps.fcc.gov/ecfs/document/view?id=7022010808> ("Sprint supports [SECA's fourth suggestion] with one clarification: the service components of the bundled and unbundled offerings must be identical in terms of type of service/calling plan, demand quantity, length of service and other terms and conditions. Unless the service components are identical, direct price comparisons will be difficult if not impossible.")

applicants and service providers who have acted in good faith on the Commission's policy, as disseminated by USAC in the modification to its Free Services Advisory, should have their funding requests promptly approved.

As a longer range objective, the Commission should improve the method used for determining the products and services eligible for E-rate funds.

The Free Cell Phone issue raises larger, strategic concerns about how the Commission should be evaluating the products and services that can be supported through E-rate. The current regulatory environment is marked by inherent tension between competing concerns. These concerns involve new and highly beneficial technologies and configurations on the one hand, and Funding Cap pressure on the other. Both SECA and E-Rate Central have expressed concern over the Free Cell Phone policy's impact on Fund demand.¹¹

The position advocated in these Reply Comments is that marketplace realities must be recognized, including innovative service provider marketing programs. The very real Funding Cap problem will not be solved by a short term approach that identifies the wrong target. Instead, a comprehensive evaluation of the E-rate funding model is required. Two observations are relevant to that broader discussion.

First, the present method of choosing what is eligible for E-rate support is increasingly unworkable due to the highly beneficial explosion of new

¹¹ SECA Petition, page 2 ("What will this [policy] do to the demand for Priority 1 E-rate funds which already is growing at a rapid rate and within the next two years likely will exceed available funds?") and Comments of E-rate Central (filed September 10, 2012), page 2 ("By tearing cost allocation asunder, the demand for E-rate funding would skyrocket."), available at <http://apps.fcc.gov/ecfs/document/view?id=7022009927>.

technologies. Second, E-rate would be significantly simplified and improved if the current reactive regulatory approach was replaced with a more proactive one, developed through economic modeling.

E-rate eligibility. The combination of new and innovative technologies contrasted against Funding Cap pressure provides an inconsistent result in what the Commission finds to be eligible and not eligible for funding. Some technologies that appear to meet Universal Service objectives are denied E-rate funding.¹²

The Commission has inadvertently departed from an important original principal for E-rate, namely that applicants should be choosing the communication technology solutions that they, the applicants, find to be in their own best interest. As indicated in the 1997 Order establishing E-rate:

This program provides schools and libraries with the maximum flexibility to purchase the package of services they believe will meet their communications needs most effectively.¹³

Over time, the Commission has transitioned from specifying the “forest” of broad Universal Service objectives, as specified in the 1997 Order, to the “trees” of highly specific eligibility determinations. This has perhaps been necessary as E-

¹² Some technologies are specified as eligible in the ESL while others are not eligible, even though they appear to provide highly similar functions. Examples include:

- Proxy servers are eligible but caching servers are not;
- Firewalls are eligible but Intrusion Protection Systems are not;
- Certain construction costs for “lit” fiber networks are eligible but such costs for “dark” fiber networks are not.
- Tape backup units are eligible but virus protection is not.

¹³ Report and Order in CC Docket 96-45, FCC 97-157 (adopted May 7, 1997, released May 8, 1997), paragraph 29, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-97-157A1.pdf.

rate has evolved, but raises the question of whether that regulatory structure is the most appropriate for all time. In general, the Commission's regulatory philosophy has tended to provide as much flexibility as possible so that diverse marketplace solutions can compete and evolve. E-rate would benefit from further adherence to that approach.

Furthermore, the Eligible Services List as presently constituted has outlived its usefulness. It is filled with jargon that is not well understood by educators. Funding requests must not only be consistent with the List, but additionally must be compliant with technical documents on the USAC website (such as On-premise Priority 1 Equipment¹⁴ and Wide Area Networks¹⁵) and with Commission rules and Orders. This large set of information in many cases will be either unknown, not understood, or misunderstood. The Free Cell Phone policy is a perfect example. Even the top E-rate experts cannot claim that they fully understand eligibility. Technology is moving too quickly for the current approach—reactive and centralized—to be effective.

A proactive regulatory structure. Under the current regulatory environment, additional Commission clarifications, Orders, and rules are required on top of existing rules, and then even further regulatory overlays to address any additional consequences that are raised. Despite these complexities, past E-rate accomplishments must be recognized and applauded. Future E-rate

¹⁴ See On-premise Priority 1 Equipment, available on the USAC website at <http://usac.org/sl/applicants/beforeyoubegin/eligible-services/priority-one.aspx>.

¹⁵ See "Wide Area Networks (WANs)," available on the USAC website at <http://usac.org/sl/applicants/beforeyoubegin/eligible-services/wan.aspx>.

accomplishments, however, should be based on an improved regulatory structure.

A better approach would be proactive. By “proactive” is meant a regulatory structure that newly identifies and then fosters the most economically efficient incentives toward the Universal Service outcomes that are desired today.¹⁶ Complexities would be minimized while natural economic incentives would be recognized.

With no dollar cap on what any individual school or library can spend on technology, but with only limited funds available in total, restrictions or priorities must be established, as is currently the case. Even with those tools, Funding Cap pressure is a natural outgrowth when free money is available without individual limits. This is a “zero-sum” game where every E-rate “winner” that gets more is offset by another party that gets less. The task in such an environment is to evaluate and potentially adjust the relative distributions so they remain equitable to all parties and the most optimal for current Universal Service objectives.

Complex and ever-growing eligibility requirements are an additional outcome of the current system. In a new environment that recognizes that unlimited per-location funding cannot be sustained for all time, a more flexible and simplified set of eligibility requirements can be developed.

¹⁶ A fuller discussion of such a structure is provided in Comments of Philip B. Gieseler to the Further Notice of Proposed Rulemaking and Notice of Proposed Rulemaking in CC Docket 02-6 and GN Docket 09-51 (filed July 9, 2010), available at <http://apps.fcc.gov/ecfs/document/view?id=7020521220>. Appendix A describes FCC Core Principles, including the principle of Applicant Choice. Appendix B discussed regulatory incentive structure. Appendix C provides a historical perspective of E-rate eligibility.

Proactive regulation would provide an improved incentive structure for accomplishing Universal Service objectives in today's rapidly-changing technological environment. Therefore, as the Commission addresses important policy questions regarding the Funding Cap, it should develop a framework that returns to broad principles rather than narrow specifications. Under such a structure, the vibrant technology marketplace would provide optimal solutions for diverse needs, and applicants will have increased incentive to use limited funds even more wisely.

The Free Cell Phone issue is a symptom that identifies this larger regulatory area. A renewed evaluation of how limited E-rate funds can be most equitably distributed, coupled with significant simplification of eligibility, would be highly beneficial.

Conclusion

For the above reasons, the Commission should:

- Provide guidance to the public and to USAC that will clarify the ability of applicants to take advantage of the previously-released policy regarding free components, either by reaffirming the current policy or providing further clarification.
- Provide that guidance as immediately as possible, perhaps in conjunction with release of the next Eligible Services List.
- In the coming months, institute a comment period for the public to consider what comprehensive changes should be made in the E-rate

funding model that will substantially reduce this same type of confusion in the future.

Respectfully submitted,

Philip B. Gieseler
Orange, VA
pgieseler@gmail.com

September 24, 2012