

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Schools and Libraries Universal Service Support Mechanism	)	CC Docket No. 02-6
	)	
Wireline Competition Bureau Seeks Comment on Revisions to FCC Forms 472, 473 and 474	)	DA 13-363

**Comments of The Schultz Group, PLLC**

The Schultz Group, PLLC (“The Schultz Group”)<sup>1</sup> hereby submits these comments in response to the Public Notice (the “Public Notice”) issued by the Wireline Competition Bureau (“Bureau”) in the above-captioned proceeding, seeking comment pursuant to the Paperwork Reduction Act (“PRA”) on changes to Forms 472, 473, and 474, which in turn implement certain Commission rules governing the schools and libraries universal service support mechanism, also known as “E-Rate.”<sup>2</sup>

Particularly with respect to the “lowest corresponding price” certification proposed in the revisions to the Form 473, the Bureau may not proceed until the Commission amends and clarifies the “lowest corresponding price” rule, including by completing action on the pending Petition for Declaratory Ruling filed by the United States Telecom Association (“USTelecom”) and CTIA – The Wireless Association (“CTIA”) in 2010.<sup>3</sup> Without additional guidance as to the scope and meaning of that rule, the certification not only exceeds the scope of the rule itself,

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<sup>1</sup> The Schultz Group is one of the nation’s preeminent federal compliance consulting firms specializing in technology programs funded through federal grant awards and Universal Service Fund programs, including E-Rate.

<sup>2</sup> Public Notice, CC Docket No. 02-6, *Wireline Competition Bureau Seeks Comment on Revisions to FCC Forms 472, 473 and 474*, DA 13-363 (Wir. Comp. Bur., rel. Mar. 8, 2013).

<sup>3</sup> *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, United States Telecom Association and CTIA-The Wireless Association Petition for Declaratory Ruling (filed Mar. 19, 2010) (“USTelecom/CTIA Petition”).

necessitating Commission rulemaking action, but service providers will be unable in many cases to determine whether they are “in compliance with and [have] taken reasonable steps to implement the lowest corresponding price rule as required by the Commission’s rules at 47 C.F.R. § 54.511(b).”<sup>4</sup> Each concern is discussed in turn, below.

**A. The Proposed Certification Exceeds the Bureau’s Authority Under Section 54.511(b)**

The “lowest corresponding price” rule was originally enacted to apply only to providers of Tier 1 telecommunications services, and the Bureau, therefore, may not require providers of Internet access and internal connections to execute the “lowest corresponding price” certification under the existing rule. In adopting the 1997 *Universal Service Order*, the Commission explained that the rule would “require that a *carrier* offer services to eligible schools and libraries at prices no higher than the lowest price it charges to similarly situated non-residential customers for similar services.”<sup>5</sup> It explained at the time that its goal was to “ensure that a lack of experience in negotiating in a competitive *telecommunications service* market does not prevent some schools and libraries from receiving such offers.”<sup>6</sup> And, in describing the geographic area over which the rule would apply, the Commission stated:

“We do not limit here the area in which a *telecommunications carrier* or a subsidiary or affiliate owned or controlled by it can choose to provide service. We also agree with the Joint Board that *telecommunications carriers* be required to offer schools and libraries services at their lowest corresponding prices throughout their geographic service areas.”<sup>7</sup>

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<sup>4</sup> Public Notice, Attachment, Draft Form 473, Block 2, para. 20.

<sup>5</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, 12 FCC Rcd 8776 (1997), at ¶ 484 (“*Universal Service Order*”) (subsequent history omitted) (emphasis added).

<sup>6</sup> *Id.* (emphasis added).

<sup>7</sup> *Id.* at ¶ 487 (emphasis added).

With specific regard for the certification requirement governing “lowest corresponding price” compliance, the Commission explicitly limited the scope of the rule to providers of Tier 1 telecommunications services, stating:

[W]e agree with the Joint Board's recommendation that, as a condition of receiving support, *carriers* be required to certify that the price they offer to schools and libraries is no greater than the lowest corresponding price based on the prices the carrier has previously charged or is currently charging in the market. ***This obligation would extend, for example, to competitive LECs, wireless carriers, or cable companies, to the extent that they offer telecommunications for a fee to the public.***<sup>8</sup>

Even the remedies contemplated by the Commission focus on telecommunications services, with the Commission’s rule providing that, “[s]chools, libraries, and consortia including those entities, and service providers may have recourse to the Commission, regarding interstate rates, and to state commissions, regarding intrastate rates, if they reasonably believe that the lowest corresponding price is unfairly high or low.”<sup>9</sup>

Similarly, on reconsideration, the Commission addressed questions regarding the use of expired or contract tariffs, “special regulatory subsidy” pricing, and the treatment of volume discounts, all concepts emanating from the offering of regulated telecommunications services.<sup>10</sup>

Although Section 54.511(b) itself suggests broader application of the rule, stating that “[p]roviders of eligible services” are subject to the “lowest corresponding price” rule, this language should therefore be read in conjunction with the Commission’s *Universal Service Order* language in adopting it. As discussed above, in adopting the rule, the Commission focused strongly on the obligations of telecommunications carriers. This is particularly so given

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<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> 47 C.F.R. § 54.504(c); *Universal Service Order* at ¶ 490.

<sup>10</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourth Order on Reconsideration, FCC97-420, 13 FCC Rcd 5318 (1997), at ¶ 137.

that, neither in 1997 or subsequently, has the Commission asserted Title II regulatory authority over the pricing of Internet access services or internal connections. Given the significant Title II jurisdictional questions that such an unprecedented assertion of authority over rates for non-telecommunications services would raise, had that been the intent of the rule, it would be exceedingly strange for the Commission to have adopted it without a single word to explain the basis for its statutory authority.

In one of its few decisions discussing the rule after that time, the Commission reinforced this interpretation. Discussing the regulatory status of the Iowa Communications Network, the Commission stated that, “to achieve the goal of allowing schools and libraries to obtain telecommunications services at discounted rates, Congress designed a system by which *common carriers*, in the course of providing service to the public generally, are required to offer discounted rates to those eligible entities . . . . The *carriers* shall offer the lowest corresponding price to eligible schools and libraries, and shall be reimbursed by the universal service support mechanism for the difference between the lowest corresponding price and the discount for which a school or library is qualified, pursuant to our rules.”<sup>11</sup>

**B. The “Lowest Corresponding Price” Rule Is Not Sufficiently Clear to Permit Carriers to Execute the Proposed Certification**

Even as to telecommunications carriers, the Bureau may not require the proposed certification unless and until the Commission adopts corresponding amendments to clarify the scope of the rule. Since enacting the “lowest corresponding price” rule in 1997, and despite its vague wording, the Commission, the Bureau, and the Universal Service Administrative

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<sup>11</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Declaratory Ruling, FCC 99-10, 14 FCC Rcd 3040 (1999) (*Iowa Communications Network*”), at ¶ 8 and n.18 (emphasis added).

Company (“USAC”) have provided little guidance on its meaning and intended operation. As the 2010 USTelecom/CTIA Petition observed, “[t]he actual text of the three lowest corresponding price rules – the definition, the actual obligation, and the mechanism for raising disputes over a lowest corresponding price – has been largely unchanged since” their adoption, and “[w]ith respect to the . . . lowest corresponding price obligation . . . , there have been few significant developments since the *Universal Service Report and Order*.”<sup>12</sup>

The USTelecom/CTIA Petition requested that the Commission consider six specific requests for clarification of the “lowest corresponding price” rule. Yet, that Petition remains pending at the Commission, even as the Bureau proposes a certification here that, without further clarity as to the underlying obligations, few service provider general counsels could comfortably permit their companies to sign.

The Schultz Group has identified only three decisions, all from 2012 and all regarding the same service provider, addressing Requests for Review of USAC interpretations of the rule. In each case, the Bureau’s discussion of the rule consisted of two conclusory sentences. The decisions, taken together, serve only to cast further doubt on the meaning of the rule. In each case, the Bureau concludes that the service provider complied with the rule after comparing the prices charged to the school in question with examples of pricing the service provider charged to other commercial customers. In one case, the Bureau found that the school’s pricing was “lower,”<sup>13</sup> while in two other cases, the Bureau found that the school’s pricing was “comparable”<sup>14</sup> to that charged to other commercial customers.

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<sup>12</sup> USTelecom/CTIA Petition at 10, 13.

<sup>13</sup> *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Requests for Review of Decisions of the Universal Service Administrator by Net56, Inc., Palatine, IL, DA 12-1792, 27 FCC Rcd 13606 (Wir. Comp. Bur., TAPD, 2012), at ¶ 14 (“Net56 provided

These decisions shed little light on the Commission's intended compliance criteria. How will the Bureau determine which of two sets of prices is "higher" or "lower," when a service provider's bids include prices for a range of services requested by a school or library, and individual elements may differ from those in other proposals? How will the Bureau determine whether two sets of prices – or two customers – are "comparable?" Without an understanding of these issues, it would be impossible for a service provider to reach the level of certainty necessary to execute a meaningful compliance certification. Moreover, because of the lack of such standards, the certification requirement risks turning the service provider's good faith efforts to comply into a violation involving misrepresentations and false certifications to the Commission.

In the Commission's *Universal Service Order* and *Fourth Reconsideration Order*, the Commission acknowledged certain factors that could justify pricing differentials among school and library customers, and between E-Rate customers and non-E-Rate customers, but provided only general guidance. The *Universal Service Order*, in particular, stated:

[W]e will only permit providers to offer schools and libraries prices above the prices charged to other similarly situated customers when those providers can

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examples of prices for its commercial customers for Internet access, wide area network, web and email hosting, and firewall services and compared them to the **lower** prices that it charged to Harrison." (emphasis added).

<sup>14</sup> *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Requests for Review of Decisions of the Universal Service Administrator by Net56, Inc., Palatine, IL, DA 12-1951, 27 FCC Rcd 15071 (Wir. Comp. Bur., TAPD, 2012), at ¶ 9 ("Net56 provided examples of prices for its commercial customers for Internet access, web and email hosting, and firewall services and compared them to the **comparable** prices that it charged to Posen-Robbins.") (emphasis added); *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Requests for Review of Decisions of the Universal Service Administrator by Net56, Inc., Palatine, IL, DA 12-2031, 27 FCC Rcd 15799 (Wir. Comp. Bur., TAPD, 2012), at ¶ 6 ("Net56 provided examples of prices for its commercial customers for web and email hosting services and compared them to the **comparable** prices that it charged to Country Club Hills.") (emphasis added).

show that they face demonstrably and significantly higher costs to serve the school or library seeking service. EDLINC asks us to prohibit carriers from distinguishing among customers based on anything other than traffic volumes in comparing costs. We decline to adopt this approach because we find it reasonable for rates to reflect any factors that clearly and significantly affect the cost of service, including mileage from switching facility and length of contract.

Beyond its clear focus on telecommunications services, this language implies that the Commission intends the Bureau, USAC, and E-Rate auditors to examine service providers' underlying costs at a level of detail that previously providers of unregulated Internet access and internal connections may find impossible to generate. Moreover, guidance from USAC today completely elides this cost-based justification for pricing differentials, misstating stating that the rule ensures that “[s]ervice providers do not charge E-rate applicants more than they would charge their other non-E-rate services customers for the same services.”<sup>15</sup>

In addition to the volume discounts and other factors discussed above, service providers may incur costs that vary significantly from one customer to another. Each job presents its own unique challenges, yet it may be impossible to quantify the precise impact of each factor on cost for purposes of determining whether two customers are “similarly situated.” For example, how are individual schools constructed? Are raceways or conduits available to run wiring? What is the availability and pricing of last mile and middle mile transport to reach an Internet access point? What other contract terms and conditions may affect cost? Even two schools of similar size in the same area may present vastly different challenges that affect contract pricing.

For that matter, are the relevant considerations solely related to the cost of performance for similar schools? What about considerations related to the number of qualified suppliers in the area? Can the service provider take into account its anticipated workload during the period

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<sup>15</sup> See <http://www.usac.org/sl/service-providers/step02/lowest-corresponding-price.aspx> (visited Mar. 27, 2013).

when it will need to perform the contracted work, including whether the job will require substantial overtime in light of preexisting commitments? What if the availability and cost of materials has changed, even within a single funding year, as happened when recipients of Broadband Technology Opportunities Program and Broadband Initiatives Program grant awards created a sudden spike in demand for fiber optic cable, just as an earthquake in Japan damaged manufacturing facilities?<sup>16</sup>

The Commission itself has analogized the “lowest corresponding price” rule to the common carrier duties contained in Sections 201 and 202 of the Communications Act of 1934, as amended (the “Communications Act”), to offer rates, terms, and conditions of service that are “just and reasonable,”<sup>17</sup> and do not reflect “any unjust or unreasonable discrimination.”<sup>18</sup> But, as competition has developed and the Commission has increasingly detariffed services and loosened rate regulation, it has become increasingly difficult for the Commission, carriers, and customers alike to articulate clear criteria that define these core carrier obligations. The difficulties the Commission faces in applying those standards to telecommunications services are multiplied for providers of Internet access and internal connection, who have never been subject to regulated pricing standards of any kind, let alone a rule as vaguely drawn as the “lowest corresponding price” requirement.

Further, whatever merit the “lowest corresponding price” rule may have had in 1997, the need for it has been sharply reduced today. As AT&T demonstrated in its comments on the

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<sup>16</sup> See, e.g., Stephen Hardy, “Fiber Shortage Likely to Continue for at Least Another Quarter,” *Lightwave* (October 5, 2011), available at: <http://www.lightwaveonline.com/blogs/lightwave-blog/2011/10/fiber-shortage-likely-to-continue.html> (visited March 27, 2013).

<sup>17</sup> 47 U.S.C. § 201(b).

<sup>18</sup> 47 U.S.C. § 202(a); see *Iowa Communications Network* at ¶ 18.



USTelecom/CTIA Petition, the E-Rate marketplace is now characterized by robust and irreversible competition, while E-Rate applicants have grown into sophisticated consumers of supported services who are amply assisted by an array of experienced consultants.<sup>19</sup>

The Commission should take the opportunity offered by the USTelecom/CTIA Petition to clarify and articulate the meaning of the “lowest corresponding price” rule, before the Bureau may require service providers to make the type of certification proposed in the Public Notice. This is particularly the case where, as here, the Bureau appears to propose to apply the certification requirement far more broadly than the Commission intended in adopting the rule.

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For the foregoing reasons, The Schultz Group urges the Bureau not to impose the certification contained in the draft Form 473, Block 2, paragraph 20, regarding the “lowest corresponding price” requirement, unless and until the Commission first amends its rules to clarify the intended scope of that requirement and articulate workable standards against which service provider compliance may be measured, as described more fully herein.

Respectfully submitted,



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<sup>19</sup> *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Comments of AT&T Inc. (filed May 14, 2010), at 6-14.