

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

In the Matter of)	
)	
Schools and Libraries Universal Service Support Mechanism)	CC Docket No. 02-6
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
Wireline Competition Bureau Seeks Comment on the Eligibility of Bundled Components under the Schools and Libraries Program)	DA 13-592

Comments of Jive Communications, Inc.

Jive Communications, Inc. (“Jive”), through counsel, hereby submits these reply comments in response to the Public Notice (the “Public Notice”)¹ issued by the Wireline Competition Bureau (“Bureau”) in the above-captioned proceedings seeking comments on the eligibility of certain bundled end user equipment under the Schools and Libraries Universal Service Support Mechanism (“E-rate”).

In these comments, Jive urges the Commission to reaffirm the Free Device Policy articulated in the Commission’s *Sixth Report and Order*² and the Bureau’s *Clarification Order*,³

¹ Public Notice, CC Docket No. 02-6, GN Docket No. 09-51, *Wireline Competition Bureau Seeks Comment on the Eligibility of Bundled Components under the Schools and Libraries Program*, DA 13-592 (Wir. Comp. Bur. rel. Apr. 9, 2013).

² *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Sixth Report and Order, FCC 10-175, 25 FCC Rcd 18762 (2010) (“*Sixth Report and Order*”).

³ *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 10-2355, 25 FCC Rcd 17324 (Wir. Comp. Bur. 2010) (“*Clarification Order*”). The *Clarification Order*, at ¶ 11, limited the requirement to cost-allocate bundles containing eligible and ineligible components to cases where service providers “offer special equipment discounts or equipment with service arrangements to E-rate recipients that are not currently available to some other class of subscribers or segment of the public.” The Bureau offered as an example that, “many cell phones are free or available to the general public at a discounted price with the purchase of a two-year service contract. Schools and libraries 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. Therefore, a service provider may not offer free iPads to a school with the purchase of telecommunications or Internet access services

while creating E-rate eligibility rules that do not artificially favor or disfavor certain providers or technologies at the expense of others. Jive believes that the Commission should continue to provide Priority One funding for bundles that include eligible telecommunications services and end user devices, including VoIP handsets, because it is difficult to determine the price of a piece of end user equipment independently from that of the service with which it is bundled, and those bundles represent the most cost effective way for applicants to obtain these services.

Nevertheless, Jive believes first and foremost that the Commission's rules in this area should be clear, and should apply equally to all providers' bundled services, in order not to distort competition or favor one technology or provider over another.

Introduction

Founded in 2006, Jive is a provider of interconnected Hosted Voice over Internet Protocol ("VoIP"), among other Unified Communications services, to institutional and enterprise customers. Jive offers its Hosted VoIP services to institutional and other enterprise customers in conjunction with a selection of Cisco, Polycom, and other SIP-enabled handsets and related hardware. Jive began participating in the E-rate program for FY 2010.

Since it began participating in the E-rate program, Jive has worked diligently to develop service offerings that comply with the E-rate rules, while offering superior value and functionality to its E-rate applicant customers. Jive is committed to playing by the rules in order to minimize regulatory uncertainty and the risk of funding commitment delays, denials, or adjustments. After careful examination of this "Free Device Policy" articulated in the Commission's *Sixth Report and Order*, the Bureau's *Clarification Order*, and USAC's response

eligible under E-rate, if such an arrangement is not currently available to the public or a designated class of subscribers," *id.* at ¶ 11 n. 25.

to its request for clarification submitted to USAC's Client Services Bureau, in 2012, Jive began offering customers that purchase its Hosted VoIP service with a 36-month term commitment access to a limited selection of free handsets to use with the service. Customers that do not make the 36-month service commitment must purchase handsets separately, but receive the same rate for Jive's Hosted VoIP services as similar customers making the 36-month term commitment. Jive makes these offers available to all of its institutional or enterprise customers, including E-Rate applicants, without distinction.

Discussion

A. The Commission Should Not Require Cost Allocation for Packages that Include Free Devices with Eligible E-Rate Services

Contrary to the concerns raised in the Public Notice, Jive believes that the current policy permitting Priority One E-rate support without cost allocation for providers that, under carefully delimited circumstances, offer free devices, such as handsets, to customers purchasing eligible telecommunications services does not create either operational risks or sustainability risks to the E-rate program.⁴

1. The Free Device Policy Enhances the Benefits of the E-Rate Program

The Free Device Policy facilitates cost-effective procurement by E-rate applicants of handsets and other devices necessary to use the associated eligible services, often at no increase in cost beyond what would be required to obtain the Priority One service on a standalone basis. Such is the case with Jive, which offers its Priority One Hosted VoIP service at the same price, whether or not the customer purchases it on a month-to-month basis, or elects a three-year term. With a three-year term commitment, however, the customer also may receive VoIP handsets at

⁴ E.g., Public Notice at ¶¶ 7-8.

no additional charge. While the free handsets represent a benefit to the applicant, they thus have no impact on the amount of E-rate funding required. Jive neither offers a lower price for its service if the customer declines the VoIP handsets, nor charges a higher monthly price for the service if the customer elects not to make the three-year commitment.

Thus, free broadband devices included with eligible service enhance the E-rate program as a whole at minimal, if any cost, by permitting the applicant to extract more value from the funded Priority One services and allowing it to stretch local budget funds required for the non-discounted share to cover a larger number and variety of such devices than otherwise would be possible.

Further, the Bureau's proposal to eliminate the current "Free Devices Policy" would run counter to the President's recently-announced policy initiative to dramatically accelerate the availability of broadband Internet in the classroom. On June 6, 2013, the President launched a new policy initiative, "ConnectED," directing the Commission "to begin a process that will connect 99 percent of America's students to high-speed broadband Internet within five years," including both true high speed Internet connectivity and "affordable digital devices."⁵ Today's policy, permitting E-rate funding for bundles that include both broadband Internet access and the devices necessary to use that access, dovetails well with the President's goals without creating any major risks to the larger program. The Bureau's proposal to end this policy would represent a major step backward.

Indeed, Jive would welcome a reaffirmation of the Free Device Policy, in order to offer even more free features with their service packages. With that flexibility, for example, Jive

⁵ Remarks by the President at Mooresville Middle School, Mooresville, NC, June 6, 2013, available at: <http://www.whitehouse.gov/the-press-office/2013/06/06/remarks-president-mooresville-middle-school-mooresville-nc>.

would have the capability to add such additional free features as outbound emergency notification (a particularly valuable safeguard in the school environment) and call recording features, features that in some cases it is already including, at no charge, to non-E-rate customers as part of the service package. Particularly as these features become common for commercial, non-E-rate customers, it would be troublesome if E-rate customers were precluded from obtaining similar value.

2. The Free Device Policy Does Not Create Insurmountable Implementation Risks or Sustainability Threats to the E-Rate Program

The Public Notice seeks comment on any cost allocation issues associated with the bundling of eligible and ineligible services, as well as the potential use of the exception for ancillary components of the bundle.⁶ Jive believes that an examination of these rules clearly illuminates the futility of any cost allocation exercise in this context, and the benefits of finding the Free Device Policy to be a specific instance of components that should be considered ancillary.

Jive disagrees with the Bureau's assertion that blanket cost allocation requirement would alleviate a perceived "lack of clarity" surrounding the Free Devices Policy.⁷ Cost allocation in this context would be neither necessary nor straightforward. The Commission's rules require cost allocation only when there is a "clear delineation" between the eligible and ineligible components. In such cases, the allocation method must meet two conditions. It must (1) have a "tangible basis," and (2) the eligible portion must be the most cost-effective means of receiving the eligible service.⁸

⁶ Public Notice at ¶¶ 10-11.

⁷ Public Notice at ¶ 8.

⁸ See 47 C.F.R. § 54.504(e)(1) ("*Ineligible components*. If a product or service contains ineligible components, costs must be allocated to the extent that a clear delineation can be made between the

Here, there is no clear delineation. Service providers that offer free devices to customers making a multi-year service commitment necessarily include in the price of the service the costs of each component, together with a set of common costs associated with the provision of these products and services. Across the industry, providers offering such packages may include such common costs as those of the store or sales team, billing, customer service representatives, and other corporate operations expenses. Where, as here, both components of the package are required for the service to function, there is no means of allocating these common costs among the services in the bundle that is economically more efficient than any other.

Further, while the end user devices clearly have some cost, there is no clear way to assess their relative impacts on the package price, which, as Sprint Nextel and Kaplan observe, is likely to be the same whether or not the customer accepts the free devices.⁹ In the case of Jive, for example, the price of a three-year contract is the same whether or not the customer accepts the free VoIP handsets Jive offers. Contrary to Kaplan's suggestion, therefore, it is incorrect to conclude that, "the cost of the phone will be built in to the monthly fee."¹⁰ Rather, the cost of equipment may be offset for the provider, for example, by lower customer retention costs and the predictability of multi-year revenue stream. It is impossible to determine the precise relative extent to which the cost of the equipment and the savings from other factors affect the bundle price.

eligible and ineligible components. The delineation must have a tangible basis, and the price for the eligible portion must be the most cost-effective means of receiving the eligible service.”).

⁹ Sprint Nextel Comments at 2-3 “Sprint is unaware of any cases in which the entire bundle (eligible service + free equipment) was in fact more expensive than the E-rate eligible-only service package.”); Kaplan Comments at 2 (“[T]here is often no lower price offered by the phone companies for not taking the devices.”).

¹⁰ Kaplan Comments at 1.

Further, Jive disagrees with the assertions in the Public Notice that, “open-ended and widespread use and expansion of this exception could lead to further strain on the E-rate fund,” or that “the real cost to the provider of the ‘free’ or reduced price ineligible components results in a more expensive bundle.”¹¹ As Jive can attest, and as reflected in the record, the price of the eligible service with a term commitment that includes associated devices is often the same as the price for the eligible telecommunications service alone. Thus, it is difficult to see how the Free Device Policy would create significant upward pressure on demand for Priority One funding.

Given the “confusing, oftentimes arbitrary, and frequently contentious” nature of the cost allocation process,¹² Jive agrees with Funds for Learning that a broad and unwarranted expansion of the cost allocation requirement, such as that proposed in the Public Notice,¹³ would be likely to impose still greater costs on service providers, applicants, and USAC alike than it would simply to maintain the Free Device Policy in place. The Free Device Policy has been in effect since 2010. While that policy, like many other changes to the E-rate rules, prompted implementation questions when it was adopted, program participants have become increasingly comfortable in their understanding of its meaning. SLD is now issuing positive funding commitments for services contracts made under this Free Device Policy. There is no reason now to sow renewed confusion by abandoning a policy that is currently working well in service of the President’s recently articulated goals to dramatically expand availability of broadband service *and devices* in the classroom.

¹¹ Public Notice at ¶ 7.

¹² Funds for Learning Comments at 2.

¹³ Public Notice at ¶ 7.

3. The Free Device Policy Should be Incorporated into the Larger “Ancillary Component” Exception

Jive believes that the Bureau can alleviate many of its concerns by recognizing the Free Device Policy as a specific instance of its “ancillary component” rule.¹⁴ The Commission’s rules define an ancillary component as one where “a price for the ineligible component cannot be determined separately and independently from the price of the eligible components, and the specific package remains the most cost-effective means of receiving the eligible services, without regard to the value of the ineligible functionality.”¹⁵ These two criteria are met by packages that include otherwise ineligible devices at no additional cost over that of the associated eligible Priority One service.

First, as discussed above, and contrary to the assertion in the Public Notice,¹⁶ it is by no means straightforward to determine the price of a piece of end user equipment independently from that of the service with which it is bundled. The provider’s price for service both with and without the associated equipment is frequently the same. Further, to be accurate, any cost allocation would need to account properly for the cost reductions to the service provider of the term contract that accompanies the free equipment. And, there is no cost causative way to allocate the common costs associated with the service provider’s delivery of the package

¹⁴ Public Notice at ¶ 11.

¹⁵ 47 C.F.R. § 54.504(e)(2) (“If a product or service contains ineligible components that are ancillary to the eligible components, and the product or service is the most cost-effective means of receiving the eligible component functionality, without regard to the value of the ineligible component, costs need not be allocated between the eligible and ineligible components. Discounts shall be provided on the full cost of the product or service. An ineligible component is “ancillary” if a price for the ineligible component cannot be determined separately and independently from the price of the eligible components, and the specific package remains the most cost-effective means of receiving the eligible services, without regard to the value of the ineligible functionality.”).

¹⁶ *Id.*

between the eligible and ineligible components. Finally, as Jive pointed out in earlier comments in this docket:

Although free equipment included in E-Rate contracts might nominally be sold on a standalone basis . . . it is also clear that the lines between the equipment and the service sold in packages are increasingly blurred. Particularly in the mobile wireless industry, service providers frequently have exclusive rights to certain handsets, which manufacturers have optimized for use on their networks; these handsets are “locked” to prevent use with other providers’ service; and, even in cases where the carrier is willing to “unlock” the handset, today’s diversity of frequency bands and transmission standards are likely to limit the handset’s ability to function using other providers’ services in any event. The market pricing of equivalent “unlocked” handsets available from the handset manufacturer is equally unavailing; unlocked handsets offer the user a level of worldwide geographic flexibility in selecting and using communications services that make them attractive to an entirely different customer from the buyer of a package that includes a particular provider’s services and a locked handset.¹⁷

Thus, as equipment becomes increasingly tailored to the needs of the service provider supplying it, there may be no independently established standalone price for a given device.

Second, with increasing frequency, the most cost effective way for a customer to obtain the eligible service is for the customer to accept the free device that accompanies a term contract for service. The device is essential for the customer to use the service, and acceptance of the provider’s offer of free equipment avoids the cost and administrative expense of procuring different equipment elsewhere. Again, as Jive explained in earlier comments, “[n]ot only is the complete package of components (*i.e.*, handset and service) required for the service to function, standalone handset pricing is nearly always designed to reward the customer willing to make a term commitment to the service provider. The monthly recurring charges for Jive’s services, for example, are identical for month-to-month customers and those signing a three-year commitment.”¹⁸

¹⁷ *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Comments of Jive Communications, (filed Sept. 10, 2012), at 7.

¹⁸ *Id.* at 7-8.

As a possible refinement of the ancillary component rule, the Commission could establish that the portion of the cost of the bundle allocated to the ineligible component should be limited to the incremental increase in the monthly price of the bundle over the standalone price of the associated Priority One service offered to similarly situated customers. Such a measure would be a more accurate reflection of any net increase in the cost of the bundle to the provider. Such a limitation, however, would need to be limited to comparisons among the packages the provider is willing to offer to that customer or similarly situated customers. In Jive's experience, for example, it is entirely possible that pricing may also vary with volume commitments, the complexity of the deployment, or other factors. It is possible, for example, that a customer purchasing a large volume of services may receive lower unit pricing than a smaller customer. Such variations have nothing to do with free equipment, but stem from well-recognized principles of cost causation, such as the relative economies of scale that service providers can bring to bear in serving larger volume customers, the complexity of the engagement, the level of competitive price pressure present in individual geographic markets, and other factors. The key consideration is that the selected package remain the most cost effective way to receive the eligible services, without regard for the ineligible components, regardless of whether the price is the lowest available to any customer, anywhere.

With such a limitation in place, it becomes clear that the "eligibility creep" fears of some commenters are overblown,¹⁹ and dissolve into mere attempts to foreclose competition from new services and more innovative providers.

¹⁹ Kaplan Comments at 2.

B. The Commission Should Establish E-Rate Bundling Rules that Apply Uniformly and Do Not Disadvantage E-Rate Applicants

The Free Device Policy is based on the Bureau's correct conclusion that E-rate should not uniquely disadvantage applicants from taking advantage of favorable pricing commonly available to other classes of customers. For example, many mobile wireless providers offer voice and data services with monthly fees that are the same, whether the customer purchases a new device from the provider, or supplies his or her own device purchased elsewhere. These mobile wireless providers often offer discounted or free devices to those customers signing up for term contracts. While other customers are free to take advantage of these offers, E-rate applicants are required to perform a cost allocation that, in effect, requires them to reallocate a substantial portion of this discount from the device to the Priority One service itself, meaning that E-rate will only fund a portion of the monthly service charges, rather than the full amount.

Within the E-rate program Jive has observed that, in the past, the staff of the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC"), the Commission's universal service administrator, has appeared much more ready to approve funding requests under the Free Handset Policy for mobile wireless telephones and other devices than it has for fixed VoIP handsets. Jive agrees with one commenter that, above all, the SLD should administer the Free Device Policy in a way that is technologically neutral, and does not favor one technology, such as mobile wireless, over others, such as fixed VoIP.²⁰ Neither the Commission nor USAC should be administering E-rate policy in such a way as to create such competitive distortions, particularly insofar as the Commission has recognized mobile services and fixed VoIP as services that consumers increasingly regard as substitutes for traditional landline voice service.

²⁰ E-rate Provider Services Comments at 2.


C. If the Commission abandons the Free Device Policy, It Should Apply the Change Prospectively Starting No Earlier than Funding Year 2014

Jive agrees with Sprint Nextel that, if the Commission were to abandon the Free Device Policy, it should do so only prospectively, grandfathering existing customers that have selected service under this Policy for the life of their existing contracts.²¹ Those contracts were made in good faith by the parties under the rules of the program in existence for the applicable funding year, and it would be inequitable now, both for schools and libraries, and for the service providers that serve them, to upset these settled expectations.

Conclusion

For the foregoing reasons, Jive urges the Commission to reaffirm the Free Device Policy as discussed above.

Respectfully submitted,


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²¹ Sprint Nextel Comments at 3. For the same reasons discussed in the text, above, Jive disagrees with Broadcore's assertion that the Commission should make this change effective for Funding Year 2013. Broadcore Comments at 2. Contracts for Funding Year 2013 are already signed, and SLD is in the process of issuing funding commitments. There is no cause for the Commission to precipitate the extreme disruption that such a retroactive abandonment of the Free Device Policy would create.