

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

In the Matter of)	
)	
Schools and Libraries Universal Service Support Mechanism)	CC Docket No. 02-6
)	
Connect America Fund)	WC Docket No. 10-90
)	
Modernizing the E-Rate Program For Schools and Libraries)	WC Docket No. 13-184
)	

**COMMENTS OF THE
UNITED STATES TELECOM ASSOCIATION**

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USTelecom strongly supports policies that achieve the important public policy goal of closing the “homework gap.” Through a combination of significant private investment combined with existing universal service fund programs, USTelecom’s members are improving broadband access for groups targeted in the Petitions, including students in low-income families, and those residing in unserved/underserved areas. Despite Petitioners’ assurances, if granted, the Petitions would impact the E-Rate fund potentially leading to inappropriate use of finite financial E-Rate resources while overlapping with the CAF and Lifeline programs. By utilizing E-Rate funds to address affordability needs better addressed through the Lifeline program, and accessibility needs better addressed by the CAF program, the Commission would be unnecessarily straining its already limited USF resources by using them in situations for which they are not designed.

The Commission has acknowledged the importance of ensuring prudent and targeted application of its limited universal service fund (USF) dollars and smart coordination across USF programs. While USTelecom shares the well-intentioned goals of closing the “homework gap,” the solutions proposed by these Petitions would impact core principles of the E-rate program, and raise significant statutory, procedural and policy questions that must be carefully considered before action is taken.

Both Petitions challenge the statutory requirement that E-Rate supported services are to be provided “to” schools and libraries. The BVSD Petition seeks to extend broadband facilities to provide broadband services to public housing units in the vicinity of fiber capacity financed by E-rate, while the Microsoft Petition seeks to extend broadband services to individual students in purely residential areas relying on school’s E-Rate supported broadband capacity. A waiver grant that would allow schools and libraries to extend USF-subsidized services to the general community, rather than “to” the schools and libraries themselves, would violate the Act and would unlawfully expand the scope of the program that is expressly limited under the statute solely to services provided “to elementary schools, secondary schools, and libraries.”

Likewise, each of the Petitions raises fundamental questions regarding the Commission’s treatment of the bedrock statutory principle that E-Rate services be used primarily for “educational purposes.” The Petitioners acknowledge that their respective E-Rate subsidized services would be used both off of school premises and after school hours, but fail to identify how their proposals would ensure the statute’s “educational purposes” mandate is satisfied. The BVSD Petition in particular provides no assurances that the subsidized services would be used for educational purposes, or even be limited to the use of households with students from the school district or school offering the service or capacity, let alone the students themselves.

The Petitions also raise a host of novel questions of law, fact and policy that must be fully addressed by the Commission. Most notably, each of the Petitions asks whether E-Rate supported networks and services should be expanded beyond each school facilities’ geographic footprints and into purely residential settings. The BVSD Petition in particular proposes to expand E-Rate subsidized services to residential settings despite the fact that residential and small business customers in the Boulder area have access to a robust and affordable range of broadband services, including from cable, DSL and wireless providers.

The Petitions also seek waivers of the Commission’s cost allocation rules. The Commission’s cost allocation rules are an essential component to the sustainability of the E-Rate fund. Petitioners have not proven that the cost allocation rules are inappropriate to meet their goals, and the Commission should not be persuaded by such arguments, particularly given the absence of any accurate quantification on the true cost to the E-Rate program. In addition, the BVSD Petition also raises significant concerns regarding the resale of subsidized network capacity – this is especially problematic given that the BVSD has publicly expressed an interest in monetizing its E-Rate subsidized network assets.

The Petitions also raise a number of challenging administrative, policy and procedural issues that have significant potential to severely weaken the administrative integrity of the E-Rate program. These include significant concerns over how either of the Petitioners could comply with the requirements of the Children’s Internet Protection Act (CIPA), an underestimation of the impact that would result from waiving the Commission’s cost allocation rules, and the significant potential for inefficiencies in spending, and ‘gold plating of E-Rate subsidized networks. Before taking action on these Petitions, the Commission should fully address these issues, since failure to do so would put the integrity and sustainability of the E-Rate program in jeopardy.

Additionally, closing the homework gap is better addressed through application of more appropriate USF programs. The deployment of broadband services to unserved areas is an effort best addressed through the CAF and other Commission high-cost programs. Rather than repurpose the E-Rate program to address this challenge, a challenge that falls squarely outside of the statutory goals of the program, the CAF should instead be used to fund deployment of broadband facilities to unserved and under-served areas. Similarly, while the BVSD petition seeks to use the E-Rate program to address broadband “affordability” issues, the Commission’s revised Lifeline program is designed and far better suited to address the affordability challenge faced by low-income households.

Finally, the BVSD Petition attempts to equate its proposal to a waiver petition previously granted by the Commission in 1990 that granted the State of Alaska a waiver of the Commission’s rules to allow members of rural remote communities in Alaska to use excess service obtained through the E-Rate program. While the BVSD asserts that the “policy considerations are very similar,” this is simply not the case. The BVSD fails to note the crucial fact that the waiver at issue was limited to “Alaskan communities where there was no local or toll-free dial-up Internet access.” The lack of limited internet connectivity at issue in Alaska’s waiver request is clearly not present in the areas at issue in the BVSD Petition, where residential customers have access to a broad range of robust and affordable service.

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**COMMENTS OF THE
UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTelecom) submits these comments in response to the Public Notice (Notice)¹ issued by the Wireline Competition Bureau (Bureau) of the Federal Communications Commission (Commission). The Notice seeks comment on two petitions (collectively, “the Petitions”), one filed by Microsoft Corporation, Mid-Atlantic Broadband Communities Corporation and other petitioners (Microsoft Petition),² and the other filed by Boulder Valley School District (BVSD) and the Samuelson-Glushko Technology Law & Policy Clinic (BVSD Petition)³ (the filing parties are referred to collectively as, “the Petitioners”).

¹ Public Notice, *Wireline Competition Bureau Seeks Comment on Petitions Regarding Off-Campus Use of Existing E-Rate Supported Connectivity*, DA 16-1051 (September 19, 2016) (*Notice*).

² See, Joint Petition for Clarification or, in the Alternative, Waiver of Microsoft Corporation, Mid-Atlantic Broadband Communities Corporation, Charlotte County Public Schools, Halifax County Public Schools, GCR Company, and Kinex Telecom, WC Docket No. 13-184 (submitted June 7, 2016) (*Microsoft Petition*).

³ See, Petition for Waiver on behalf of Boulder Valley School District Samuelson-Glushko Technology Law & Policy Clinic (TLPC), WC Docket No. 13-184, WC Docket No. 10-90 (submitted May 16, 2016) (*BVSD Petition*).

The Petitions request that the Commission allow E-Rate subsidized broadband networks' capacity and services to be accessed by students at home, without an obligation on the E-Rate applicant to cost-allocate the portion of the traffic or network infrastructure attributable to off-campus use. The Petitions seek to extend E-Rate subsidized broadband networks and services into residential areas for the express goal of helping to close the "homework gap." While USTelecom agrees that closing the homework gap is a laudable goal, the Petitions raise important legal, procedural and policy questions that need to be fully addressed before they are granted. Failure to do so could jeopardize the integrity of the E-rate program and the sustainability of the E-rate fund.

I. Introduction and Background

USTelecom strongly supports policies that achieve the important public policy goal of closing the "homework gap." USTelecom's member companies are actively working to achieve this goal by improving broadband access to many underserved groups, including student populations that are in low-income families, or residing in unserved/underserved areas. These initiatives are working toward closing the "homework gap" by expanding broadband access to underserved populations, including through the Commission's Connect America Fund (CAF) program, and its Lifeline program, the latter of which was recently expanded to include broadband services.

Despite assurances to the contrary by the Petitioners, if granted, the Petitions would impact the E-Rate fund potentially leading to inappropriate use of finite financial E-Rate resources and overlap with the CAF and Lifeline programs, specifically designed to address the service availability and affordability challenges raised in the Petitions. By utilizing E-Rate funds to address affordability needs better addressed through the Lifeline program, and accessibility

needs better addressed by the CAF program, the Commission would be unnecessarily straining its already limited USF resources by using them in situations for which they are not designed.

The Commission has acknowledged the importance of ensuring prudent and targeted application of its limited universal service fund (USF) dollars and smart coordination across USF programs.⁴ While USTelecom shares the well-intentioned goals of closing the “homework gap,” the solutions proposed by these Petitions would impact core principles of the E-rate program, and raise significant statutory, procedural and policy questions that must be carefully considered before action is taken. Failure to do so would jeopardize the integrity of the E-rate program.

II. The Relief Requested by the Waiver Petitions Exceeds the FCC’s Statutory Authority for the E-Rate Program.

The Petitions seek to utilize network capacity and/or services that are funded by the E-Rate program to provide services to residential end users. The statutory language in section 254(h)(1)(B) is clear: E-Rate supported services are to be provided “to” schools and libraries for “educational purposes.” The Petitions raise important challenges to both of these statutory requirements.

A. The Petitions Challenge the Statutory Principle that E-Rate Support be Used to Provide Services “To” Schools and Libraries.

Both Petitions challenge the statutory requirement that E-Rate supported services are to be provided “to” schools and libraries. The BVSD Petition seeks to extend broadband facilities

⁴ See e.g., *Vermont Pub. Serv. Bd. v. Fed. Comm’n Comm’n*, 661 F.3d 54, 65 (D.C. Cir. 2011) (finding that, in the context of section 254, “as the Commission rightly observed, it has a responsibility to be a prudent guardian of the public’s resources.”). See also, FCC Report, *Connecting America: The National Broadband Plan*, p. 143 (released March 2010) (stating that “USF resources are finite, and policymakers need to weigh tradeoffs in allocating those resources so that the nation ‘gets the most bang for its buck;’” and noting that “while there is no doubt that federal universal service programs have been successful in preserving and advancing universal service, it is vital to ensure that these public funds are administered appropriately.”).

to provide broadband services to public housing units in the vicinity of fiber capacity financed by E-Rate, while the Microsoft Petition seeks to extend broadband services to individual students in purely residential areas relying on schools' E-Rate supported broadband capacity. Section 254(h)(1)(B) of the Communications Act (the Act) expressly states that E-Rate funds are to be used to “provide such services *to* elementary schools, secondary schools, and libraries for educational purposes.”⁵

A waiver grant that would allow schools and libraries to extend USF-subsidized services to the general community, rather than “to” the schools and libraries themselves, would violate the Act. It would unlawfully expand the scope of the program that is expressly limited under the statute solely to services provided “to elementary schools, secondary schools, and libraries.”

As a basis of support for their respective Petitions, the Petitioners point to previous Commission rulings that allow schools to open their facilities to the general public to utilize services supported by E-rate when classes are not in session.⁶ However, there are significant differences between the Commission's previous decisions and the Petitioners' respective proposal.

For example, the Commission's decision in its *Sixth Report and Order* allowed schools to permit the use of their services *at* the school's facility – services provided “to” the school for an educational purpose – that would otherwise be under-utilized or idle after school hours. In contrast, the Petitioners' respective proposals would permit the use of E-Rate Funds for the extension of broadband services “to” residential areas, and would therefore obligate E-Rate Funds for non-educational purposes off of school grounds.

⁵ See, 47 U.S.C. (h)(1)(B) (emphasis added).

⁶ Sixth Report and Order, *Schools and Libraries Universal Service Support Mechanism*, 25 FCC Rcd 18762, 75 FR 75393, FCC 10-175 (released September 28, 2010) (*Sixth Report and Order*).

The Petitioners claim that, although the off school grounds services will primarily be provided after-school hours, there will be no impact to the E-Rate fund. Regardless of the merits of that assumption, addressed below, this argument misses the point. If the Petitions are granted as proposed, the E-Rate program will be funding services that are provided to residential end users with no assurances such use will be limited to educational purposes. Such use of E-Rate funds was not contemplated by Congress and would represent a substantial departure from the statute and current Commission precedent.

B. The Petitions Challenge the Statutory Principle that E-Rate Services Should be Used Primarily for “Educational Purposes.”

The Communications Act requires that USF support committed to telecommunications carriers for E-Rate services be used only for “educational purposes.”⁷ While the BVSD Petition merely glosses over this obligation,⁸ the Microsoft Petition acknowledges that it must at least seek clarification on this term, or, in the alternative, a waiver.⁹ Regardless, each of the Petitions raises fundamental questions regarding the Commission’s treatment of the bedrock statutory principle that E-Rate services be used primarily for “educational purposes.”

In previous instances, the Commission has engaged in significant deliberation when considering the full scope of educational purposes. It has addressed such questions regarding the appropriate scope of this definition multiple times, including in 1997,¹⁰ 2003¹¹ and twice in

⁷ 47 U.S.C. § 254(h)(1)(B). Specifically, that section of the Act mandates that telecommunications services provided to elementary schools, secondary schools, and libraries are “for educational purposes.”

⁸ The BVSD Petition makes only two passing references to the educational purposes obligation. *See, BVSD Petition*, pp. i, 4.

⁹ *See, Microsoft Petition*, pp. 13 – 19.

¹⁰ *See, Report and Order, Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776, 62 FR 32862, FCC 97-157 (released May 8, 1997).

2010.¹² Each of these Commission orders addressed the appropriate scope of the educational purposes requirement, ranging from a clarification on the statutory term,¹³ to a determination on after-hours use of E-Rate supported facilities.¹⁴ The Petitioners' expansive request to clarify the phrase "educational services" to include residential service warrants an even more robust and thorough treatment by the Commission.

The Petitioners acknowledge that their respective E-Rate subsidized services would be used both off of school premises and after school hours, but fail to identify how their proposals would ensure the statute's "educational purposes" mandate is satisfied. The Petitions further fail to explain how the Commission would be able to monitor and/or verify whether such obligations are being met. The BVSD Petition in particular provides no assurances that the subsidized services would be used for educational purposes, or even be limited to the use of households with students from the school district or school offering the service or capacity, let alone the students themselves.

¹¹ See, Second Report and Order and Further Notice of Proposed Rulemaking, *Schools and Libraries Universal Service Support Mechanism*, 18 FCC Rcd 9202, 68 FR 36931, FCC 03-101 (released April 30, 2003) (*Second Report and Order*). In its *Second Report and Order*, the Commission clarified that, in the case of schools, activities that are integral, immediate, and proximate to the education of students, or in the case of libraries, integral, immediate, and proximate to the provision of library services to library patrons, qualify as "educational purposes" under the E-Rate program. See, *Id.*, ¶¶ 17 – 22.

¹² In the *Sixth Report and Order*, the Commission clarified that "educational purposes" should allow schools to open their facilities, when classes are not in session to the general public to utilize services and facilities supported by E-rate. See, *Sixth Report and Order*, ¶¶ 22 – 27. This, after the full Commission granted such rights only on an interim basis. See, Order and Notice of Proposed Rulemaking, *Schools and Libraries Universal Service Support Mechanism*, 25 FCC Rcd 1740, 75 FR 10199, FCC 10-33, ¶¶ 7 – 15 (released February 19, 2010) (*Interim E-Rate Order*).

¹³ See e.g., *Second Report and Order*, ¶¶ 17 – 21.

¹⁴ See e.g., *Sixth Report and Order*, ¶¶ 20 – 28; see also, *Interim E-Rate Order*, ¶¶ 7 – 15.

III. The E-Rate Petitions Raise Novel Questions of Law, Facts and Policy That Must be Fully Considered.

The Petitions also raise a host of novel questions of law, fact and policy that must be fully addressed by the Commission. Most notably, each of the Petitions asks whether E-Rate supported networks and services should be expanded beyond each school facilities' geographic footprints and into purely residential settings. The BVSD Petition in particular raises significant concerns regarding the expansion of E-Rate supported services and infrastructure well beyond the confines of the Act. Section 254(k) of the Act prohibits telecommunications carrier from using services that are not competitive to subsidize services that are subject to competition.¹⁵

According to a report issued to the members of the City Council of Boulder, Colorado, “[r]esidential and small business customers in the Boulder area have access to a range of services.”¹⁶ Specifically, residents in this area have multiple fixed wireline options from cable broadband providers (Comcast), and DSL providers (CenturyLink, Birch and MegaPath), as well as satellite providers (HughesNet) and 3G/4G/Wireless Internet Service Provider (Verizon, T-Mobile, Cricket, AT&T, Sprint, and Rise Broadband).¹⁷ The residential speeds offered to consumers through these packages range from 3 Mbps up to 250 Mbps.¹⁸

Despite this competitive reality on the ground, the BVSD Petition discusses provisioning E-Rate supported services in specific areas (*i.e.*, Housing and Urban Development (HUD))

¹⁵ 47 U.S.C. § 254(k).

¹⁶ *See*, Columbia Telecommunications Corporation, Broadband Feasibility Study, Prepared for the City of Boulder, p. 21, July 12, 2016 (available at: https://www-static.bouldercolorado.gov/docs/Update_on_Community_Broadband_Initiative_-_July_12_2016_Study_Session-1-201607011342.pdf) (visited October 31, 2016) (*Boulder City Report*).

¹⁷ *Boulder City Report*, pp. 21 – 25.

¹⁸ *Id.*

residences) that according to the report are likely served by a broad range of broadband providers.¹⁹ In all likelihood, therefore, contrary to the assertions in the BVSD Petition, this is not an issue of “students currently lacking broadband access.”²⁰ Hence, barriers to broadband access for households with students in Boulder Valley School District are likely due to affordability factors or to lack of perceived value. Such broadband affordability issues are best addressed through the Commission’s Lifeline program, recently reformed to support broadband, and not through the E-Rate program.

The Petitions also seek waivers of the Commission’s cost allocation rules.²¹ The Commission’s cost allocation rules are an essential component to the sustainability of the E-Rate fund. The cost allocation rules serve to prevent the E-Rate program from paying for more than just eligible services. As the Commission has previously noted, permitting E-Rate support for bundled ineligible components without requiring cost allocation “could result in expenditures for ineligible equipment or services that could drain the resources available for eligible equipment or services.”²²

While the BVSD Petition asserts that such cost allocation impacts on the fund are *de minimis*,²³ it offers no evidence demonstrating that providing support for bundles of eligible and ineligible components would not impose additional cost to the E-Rate Fund. Petitioners have not proven that the cost allocation rules are inappropriate to meet their goals. The Commission

¹⁹ *Id.*

²⁰ *BVSD Petition*, p. 1.

²¹ *See, Id.*, pp. 2 – 4. While the Microsoft Petition does not specifically raise the Commission’s cost allocation rules, they would nevertheless apply under the proposal.

²² *See, Order, Wireline Competition Bureau, Schools and Libraries Universal Service Support Mechanism*, 29 FCC Rcd 5457, 79 FR 327249, DA 14-712, ¶ 7 (released May 23, 2014).

²³ *BVSD Petition*, pp. 3 – 4.

should not be persuaded by such arguments, particularly given the absence of any accurate quantification on the true costs to the E-Rate program. Especially so due to the fact that, as noted in these comments, the Petitions raise important statutory, procedural and policy questions that could potentially harm the integrity of the E-Rate program and the sustainability of the fund.

For example, the BVSD Petition proposes a complex arrangement whereby broadband internet access service would be provisioned to an unidentified number of student households within multi-dwelling units (MDUs). While the Microsoft Petition suggests some form of authentication requirement,²⁴ the BVSD Petition has no mechanisms or safeguards that would ensure use is limited to educational purposes for students, as required under the statute.

In addition, the BVSD Petition also raises significant concerns regarding the resale of subsidized network capacity. Specifically, the BVSD proposes an arrangement whereby a housing authority (or other entity) pays unidentified front-end costs to connect to the school district's E-Rate funded network.²⁵ The BVSD Petition's proposal effectively creates a resale scenario which is clearly prohibited under the statute.

Proposals to extend E-Rate subsidized networks to residential facilities are inconsistent with Section 254 and Commission precedent. The relevant statute could not be any clearer: Section 254(h)(3) explicitly provides that "[t]elecommunications services and network capacity provided to a public institutional telecommunications user under this subsection may not be sold,

²⁴ *Microsoft Petition*, p. 10. The Microsoft Petition notes that internet access through its proposal would be technically possible only in households with a specialized access point, and via an authentication protocol with assigned credentials issued to participating students.

²⁵ *BVSD Petition*, pp. 2 – 3.

resold, or otherwise transferred by such user in consideration for money *or any other thing of value.*”²⁶

By “sharing” excess capacity with ineligible users, who could include, for example, a variety of non-student users, the BVSD is effectively reselling network capacity in violation of the statute. The fact that the BVSD retains ownership of the excess capacity does not shield it from this statutory prohibition. By including “resold” in the statute, Congress clearly contemplated the scenario of an E-Rate subsidized entity retaining ownership of the network capacity while leasing use of the network capacity to another. Otherwise, Congress would have limited the statute to “sold,” a term that is generally understood to mean a transfer of ownership. Similarly, the statute does not create a carve out for E-Rate subsidized entities that use the payments from reselling network capacity to others in a certain manner, or for E-Rate subsidized entities that charge a certain amount for their excess network capacity.

Lest there be any doubt as to whether the BVSD in particular is seeking to monetize its network assets, the Commission need look no further than a 2014 BVSD memorandum discussing current initiatives with the City of Boulder (BVSD Memorandum).²⁷ The BVSD Memorandum discusses various initiatives on which staff from the BVSD and City of Boulder are collaborating. The memorandum notes that the “BVSD has a significant asset in our fiber network that can be monetized over the next 3-5 years.”²⁸ The BVSD further notes in the document the presence of certain challenges that “restrict our ability to monetize our fiber

²⁶ 47 U.S.C. § 254(h)(3).

²⁷ See, Letter from Don Orr, Assistant Superintendent of Operations, to Bruce Messinger, Ph.D., Superintendent, *Current BVSD/City of Boulder joint initiatives* (July 2, 2014) (available at: [http://www.boarddocs.com/co/bvsd/Board.nsf/files/9LW2UC687ED1/\\$file/City%20of%20Boulder%20partnerships%20%207.9.pdf](http://www.boarddocs.com/co/bvsd/Board.nsf/files/9LW2UC687ED1/$file/City%20of%20Boulder%20partnerships%20%207.9.pdf)) (visited October 31, 2016).

²⁸ *Id.*, p. 4.

assets.”²⁹ USTelecom maintains that the BVSD’s expressed intent to “monetize” its network – particularly as it seeks to expand services to residential facilities already served by broadband providers – calls into question the underlying purpose of the BVSD Petition in contravention of the statutory mandate banning resale of E-Rate-funded leased services or capacity owned by the eligible entities.

In this regard, there also are sound policy reasons why the Commission should not encourage proposals such as those contained in the Petitions, whereby E-Rate funded entities construct their own networks and resell network capacity to ineligible entities. Instead of using scarce program funds to support overbuilding the Commission should focus its efforts on areas where such services are either unaffordable (*i.e.*, the Lifeline program), or unavailable (*i.e.*, the Connect America Fund (CAF) program).

IV. Both Petitions Raise Highly Problematic Oversight Issues that Could Severely Weaken the Administrative Integrity of the E-Rate Program.

The Petitions also raise a number of challenging administrative, policy and procedural issues that have significant potential to severely weaken the administrative integrity of the E-Rate program. Before taking action on these Petitions, the Commission should fully address these issues, since failure to do so would put the integrity and sustainability of the E-Rate program in jeopardy.

A. The Petitions Raise Significant Compliance Concerns Under the Children’s Internet Protection Act.

The Children’s Internet Protection Act (CIPA) was enacted by Congress in 2000 to address concerns about children’s access to obscene or harmful content over the Internet.³⁰ The

²⁹ *Id.*

³⁰ *See*, Pub. L. No. 106-554 (*CIPA*); 47 U.S.C. §254(h)(5).

CIPA imposes certain requirements on schools or libraries that receive discounts for internet access or internal connections through the federal E-Rate program.

Among other things, CIPA requires that such schools and libraries operate robust technology protection measures, employ such measures during use by minors, sufficiently address the security and safety of minors using a broad range of online communications (*e.g.*, chat rooms, email, instant messaging, etc.), and protect against unauthorized disclosure of a minor's personal information. Finally, CIPA requires that schools receiving E-Rate discounts must also certify that they are using "technology protection measures" to block access to inappropriate content by minors.³¹

In its 2010 order adding dark fiber to the Eligible Services List (ESL), the Commission emphasized that "selecting a telecommunications carrier as a service provider does not absolve schools and libraries of their obligation to adhere to the CIPA requirements *when they use that service to obtain Internet service or access to the Internet.*"³² Moreover, CIPA specifically mandates that filtering technology be functional and operating "during any use of such computers by minors."³³ The BVSD Petition affirmatively acknowledges that its proposal would "connect a school district's network" to students residing in low income housing.³⁴ Despite the fact that schools and libraries using E-Rate discounts must comply with CIPA's statutory

³¹ See, CIPA, §§ 1701 *et seq.*; see also, *Sixth Report and Order*, n. 76.

³² *Sixth Report and Order*, ¶ 9 (emphasis added).

³³ 47 U.S.C. § 254(h)(5)(C)(ii).

³⁴ *BVSD Petition*, p. i.

obligations, the BVSD Petition makes no reference whatsoever to the requirements of the CIPA.³⁵

While each of the proposals contained in the Petitions raise questions regarding CIPA-compliance, they fail to account for how they would comply with the numerous obligations under CIPA. The Universal Service Administrative Company (USAC) administers the E-Rate program under the direction of the Commission, and is responsible for ensuring compliance by schools and libraries with, among other statutes, CIPA. Given the rules established by the Commission in its 2001 order implementing CIPA,³⁶ and the residential settings envisioned under both Petitions, it is uncertain whether the Commission, USAC and the schools seeking the Petitions could even ensure compliance with the obligations under CIPA.

For example, under the proposal envisioned in the BVSD Petition, will the school district deploy the filtering technology mandated under CIPA on the personal computing devices in private residences?³⁷ Does it even have the authority to do so given the private residential setting? While the statute permits an “administrator, supervisor, or other person authorized by the certifying authority” to disable technology protection measures,³⁸ mustn’t this authorization be extended to parents given the residential setting? If a parent permanently disables such

³⁵ In contrast, the Microsoft Petition acknowledges the obligations under CIPA and discusses the mechanisms proposed to ensure CIPA compliance. *Microsoft Petition*, p. 10.

³⁶ Report and Order, *Federal-State Joint Board on Universal Service, Children’s Internet Protection Act*, 16 FCC Rcd 8182, 66 FR 19394, FCC 01-120 (released April 5, 2001) (*CIPA Order*).

³⁷ 47 U.S.C. §254(h)(5)(B)(i) (stipulating that schools are “*enforcing* a policy of Internet safety for minors that includes monitoring the online activities of minors and the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are” obscene, child pornography or harmful to minors) (emphasis added).

³⁸ 47 U.S.C. §254(h)(5)(D).

measures and a child uses the computer, is the school still CIPA compliant given the statute's requirement that apply during "any use of such computers by minors"?³⁹ Should a public school be "monitoring the online activities of minors" within their home?⁴⁰ Finally, given the residential settings of these services, how could USAC determine compliance with CIPA through an audit? These are just some of the questions and concerns that must be addressed by the Commission before moving forward with either of these Petitions.

If the Commission were inclined to grant the Petitions, conditions must be put in place that will ensure full compliance with CIPA statutory obligations, as well as the ability to enforce and monitor such rules. Failure to do so could inadvertently place schools at risk of violating federal law and jeopardizing their E-Rate funding.

B. The Petitions Underestimate the Impact that Would Result from Waiving the Commission's Cost Allocation Rules.

The Petitions also raise a host of other administrative issues, including administrative efficiency. For example, the BVSD petition puts forth a hypothetical example whereby application of the FCC's cost-allocation rules would require the school district to exert tremendous effort to determine costs for 60 of its 30,000 students residing in public housing units.⁴¹ BVSD's example, however, significantly underestimates the true scope of the impact of waiving such cost allocation rules.

³⁹ 47 U.S.C. §254(h)(5)(B)(ii) (requiring schools to "enforce[e] the operation of such technology protection measure during *any* use of such computers by minors." (emphasis added). Similarly, CIPA also requires schools to certify that it is "enforcing the operation of such technology protection measure during any use of such computers," by adults.

⁴⁰ 47 U.S.C. §254(h)(5)(D) (require schools to "enforce[e] a policy of Internet safety for minors that includes monitoring the online activities of minors and the operation of a technology protection measure with respect to any of its computers with Internet access.").

⁴¹ *BVSD Petition*, pp. 3 – 4.

While the *total* number of students in the Boulder Valley School District is indeed 30,000, the number of students living in public housing likely far exceeds the 60 students estimated in the BVSD Petition. Indeed, the Resident Characteristics Report provided by HUD shows that as of September 30, 2016, there were 7,599 children under the age of 18 in the Boulder-Longmont MSA in public housing.⁴²

The Boulder County Housing Authority (Authority) owns and operates 609 units of affordable housing in Boulder County and administers 724 Section 8 housing choice vouchers, 50 family unification program (FUP) vouchers, and 60 Section 8 VASH vouchers.⁴³ While acknowledging the legitimate needs of the families residing in these facilities, USTelecom maintains it is far more administratively efficient for the Commission to utilize relevant USF programs to address such needs (*i.e.*, the Lifeline program) than to comprehensively reform its rules in order to apply an inappropriate program to the same individuals.

C. The Petitions Increase the Potential for Inefficiencies in Spending, and Gold Plating of Networks.

Should the Commission approve the Petitions, it would also create inefficiencies in spending and incentives to “gold-plate” networks. “Gold plating” refers to investment in unnecessary or excessive facilities to meet the connectivity demands of the schools and libraries. Rather than providing support for services that are being used today, the Commission would

⁴² See, HUD Resident Characteristics Report query website (available at: <https://pic.hud.gov/pic/RCRPublic/rcrmain.asp>) (visited November 2, 2016) (search conducted November 2, 2016) (the referenced data is reflected in the search result under the “Household” tab).

⁴³ Boulder County Housing Authority, Financial Statements, December 31, 2015, p. 26 (available at: <http://www.bouldercounty.org/doc/hhs/bchousingauthority2015.pdf>) (visited November 1, 2016).

effectively be subsidizing the stockpiling of capacity for future growth, possibly long before it is needed, while many more deserving applicants continue to go without support.

Given the absence in the Commission's rules of a cap per eligible entity for funding for Category 1 services, the BVSD Petition in particular, would introduce additional constraints on limited E-Rate funds. Funding Year 2016 is the first year in many when E-Rate funding requests were below the programs annual cap. As a result, in the past, the Commission has been forced to deny funding of eligible Priority 2 E-Rate services. In light of the overwhelming demand for E-Rate funding by schools and libraries, the Commission should carefully consider the unintended impact on the fund as a result of these Petitions and, at a minimum, design conditions that would preserve the integrity of the E-Rate Fund.

Expanding the E-Rate program in the manner proposed by the Petitioners may also create an increased risk that, in order to satisfy other community demands, eligible schools and libraries will purchase more services than they need to support on-campus activities. That would, in turn, limit the amounts that can be used by other applicants, and put a strain on the fund. Moreover, in order to try to limit such abuses, USAC would face a significant new workload to monitor service levels from year to year to determine whether increases are justified purely by educational use.

While the Petitions suggest that the use of school capacity outside of school premises would take place primarily after school-hours, they fail to identify a mechanism to ensure that access to capacity is only allowable when school is not in session. The BVSD Petition claims that the "majority of the at-home use will be during hours in which classes are not in session," this because "students are generally not home during the school day."⁴⁴ While that is generally

⁴⁴ See, *BVSD Petition*, p. i, n. 1.

true, unless the Petitions offer a mechanism to monitor and limit residential broadband use while the students are not in the home, they have no means to predict or control the use of their capacity at those student residences during school hours.

In the absence of such a mechanism to monitor and limit use of the school capacity in the home during school hours, the Petitions raise the possibility that school demand would compete for capacity with those residential users. Such a possibility could fundamentally impact statutory goals of the E-Rate program to “support services to be provided to schools and libraries for educational purposes” and place significant risks on the funds sustainability.

The Petitions raise the unintended consequence that schools would seek incremental broadband capacity that they would have otherwise demanded but for the fact that they seek to provide broadband to residential homes. Because Category 1 services received by each eligible entity are not capped, unlike Category 2 services which are capped, and particularly for school districts eligible for high E-Rate discounts, schools would have little incentive to constrain such incremental demand above and beyond what is needed to support the educational needs of the school. As such, and despite the Petitioners claim to the contrary, if granted, the Petitions present the very real possibility that the fund would be impacted.

The BVSD Petition in fact raises these concerns as it seeks a waiver from the Commission to allow school districts to provide Internet access to residences off campus when “(1) the school has not requested more services than are necessary for on-campus educational purposes; (2) no additional costs will be incurred by the Universal Service Fund (USF); (3) the majority if at-home use will be during hours in which classes are not in session.”⁴⁵

⁴⁵ *Id.*, p. i.

USTelecom maintains that such conditions would be necessary – though not necessarily sufficient – if either Petition were to be granted. Yet, as noted, the possibility that residential demand could compete with the school’s capacity needs during school hours raises significant unintended consequences that must be carefully assessed in order to ensure the integrity of the E-Rate program and fund are protected.

Indeed, these petitions, particularly the BVSD Petition, would provide a tantalizing path forward for monetization of fiber networks – a pathway that the BVSD has clearly already been considering. In addition to providing no benefits to the students and library patrons intended to be supported by E-Rate services, this path could also significantly compromise the overall viability of the E-Rate fund.

Hence, it is imperative that, if the Commission were to grant these petitions, it carefully considers conditions that ensure that a school’s use of capacity out of school premises does not in fact impact in any way, shape or form the school’s demand for capacity at any time. Such conditions would need to be viable from a technical and procedural standpoint, enforceable at all times, and capable of ensuring that USAC can monitor their impact.

V. The Homework Gap is Best Addressed Through More Suitable Application of Existing USF Programs, Such as Lifeline and the Connect America Fund

Closing the homework gap is better addressed through application of more appropriate USF programs. The deployment of broadband services to unserved areas is an effort best addressed through the CAF and other Commission high-cost programs. In fact, when the Commission reformed the USF high-cost program in 2011, it stated that it was seeking to “establish a framework to distribute universal service funding in the most efficient . . . manner

possible.”⁴⁶ The Commission also concluded that “it would not be in the public interest to provide additional support to carriers providing duplicative services.”⁴⁷

The proposals contained in the Petitions potentially undermine this intent. For example, the Microsoft Petition focuses on broadband “availability,” and students’/residents’ lack of access to broadband facilities. While residents in many low density areas may be lacking the desired level of broadband availability today, CAF build out is quickly addressing that need through commitments to invest in new plant and upgrades to be completed in the near term.

Rather than repurpose the E-Rate program to address this challenge, a challenge that falls squarely outside of the statutory goals of the program, the CAF should instead be used to fund deployment of broadband facilities to unserved and under-served areas. Similarly, while the BVSD petition seeks to use the E-Rate program to address broadband “affordability” issues, the Commission’s revised Lifeline program is designed and far better suited to address the affordability challenge faced by low-income households.

Indeed, the Commission’s recent Lifeline order encourages Lifeline providers to work with schools and libraries to address issues of affordability in order to close the Homework Gap.⁴⁸ Utilizing the Lifeline program to address the broadband affordability issues is the appropriate approach for the Commission to address the needs raised in the BVSD Petition. Just as Lifeline funding was not designed to support the needs of schools and libraries, E-Rate funding was not designed to fulfill the needs of low income families.

⁴⁶ Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663, FCC 11-161, ¶ 1 (released November 18, 2011) (*USF Order*).

⁴⁷ *USF Order*, ¶ 509.

⁴⁸ See e.g., Third Report and Order, Further Report and Order, and Order on Reconsideration, *Lifeline and Link Up Reform and Modernization*, 31 FCC Rcd 3962, 81 FR 33025, 81 FR 45973, 81 FR 67922, FCC 16-38, ¶ 373 (released April 27, 2016).

The BVSD Petition here too raises particular concerns. Providing universal service support through the E-Rate program to school entities seeking to monetize that capacity in competition with non-subsidized, private broadband service providers could have the unintended consequence of crowding out private investment, thus harming competitive dynamics to the detriment of those communities who would become more dependent on government subsidized networks.

Ensuring adequate funding is available for broadband-related projects in unserved areas is a more efficient way to extend and improve broadband availability to consumers. As former RUS Administrator Jonathan Adelstein recognized at a Senate hearing regarding federally funded broadband projects, agencies “really do need to think about how we target resources to places that the market won’t serve. That’s where federal taxpayer dollars should be focused.”⁴⁹ Senate Commerce Committee member Claire McCaskill echoed the same theme at the hearing, suggesting that federal money should not be used to compete with private investments that have already been made without the need for federal assistance.⁵⁰

VI. Any Comparison to the Commission’s Decision in the *Alaska Wavier Order* is Inappropriate.

The BVSD Petition seeks to equate its proposal to a waiver petition previously granted by the Commission in 1990.⁵¹ That Commission order granted the State of Alaska (Alaska) a limited waiver of the Commission’s rules to allow members of rural remote communities in

⁴⁹ U.S. Senate Cmte. On Commerce, Science and Transportation, Hearing on the Oversight of the Broadband Stimulus Programs in the American Recovery and Reinvestment Act, Oct. 27, 2009.

⁵⁰ *Id.* (“I just don’t want federal money competing with people who have made investments without the help of federal money.”).

⁵¹ *BVSD Petition*, pp. 8 – 9.

Alaska to use excess service obtained through the E-Rate program when not in use by the schools and libraries for educational purposes (Alaska Waiver Order).⁵²

While the BVSD asserts that the “policy considerations are very similar,” this is simply not the case. The BVSD fails to note the crucial fact that the waiver at issue was limited to “Alaskan communities where there was no local or toll-free dial-up Internet access.”⁵³ As noted in the Alaska Waiver Order, many of the schools and libraries in Alaska were forced to rely on satellite telecommunications services for their Internet connections.⁵⁴ The Commission further noted that there was “usually only one provider of this satellite down link service,” and that during times when the schools and libraries were closed, the available connections remained unused.⁵⁵ The Commission granted the waiver subject to five conditions, including that “there is no local or toll-free Internet access available in the community.”⁵⁶ Further, the Commission made grant of the waiver dependent on Alaska’s implementation of all five conditions.⁵⁷

The lack of limited internet connectivity at issue in Alaska’s waiver request is clearly not present in the area at issue in the BVSD Petition. In granting Alaska its waiver request, the

⁵² Order, *Petition of the State of Alaska for Waiver for the Utilization of Schools and Libraries Internet Point-of-Presence in Rural Remote Alaska Villages Where No Local Access Exists and Request for Declaratory Ruling*, CC Docket No. 96-45, 16 FCC Rcd. 21511 (Dec. 3, 2001) (*Alaska Waiver Order*).

⁵³ *Id.*, fn. 11.

⁵⁴ *Id.*, ¶ 4.

⁵⁵ *Id.*

⁵⁶ *Alaska Waiver Order*, ¶ 6. The remaining four conditions were that: 2) the school or library has not requested more services than are necessary for educational purposes; 3) no additional costs will be incurred, *i.e.*, services subject to a waiver must be purchased on a non-usage sensitive basis; 4) any use for noneducational purposes will be limited to hours in which the school or library is not open; 5) and the excess services are made available to all capable service providers in a neutral manner that does not require or take into account any commitments or promises from the service providers. *Id.*

⁵⁷ *Id.*, ¶ 7.

Commission noted that there were “approximately 240 communities in the state that lack local or toll-free dial-up access to the Internet,” and that many of the communities “are reachable only by air or water.” As a result, access to information services was both “minimal and generally cost-prohibitive.”⁵⁸ Moreover, the Commission noted that “nearly 75 percent of rural Alaskan communities do not have Internet access via a local dial-up or toll-free connection,” and that schools and libraries were the only facilities with such access due to assistance from the E-Rate program.⁵⁹

This stands in stark contrast to the competitive realities at issue in the BVSD Petition. As noted previously, “[r]esidential and small business customers in the Boulder area have access to a range of services,”⁶⁰ including from cable broadband providers, DSL providers and 3G/4G/Wireless Internet Service Providers. Moreover, unlike the substantial costs of such service referenced both in the Alaska Waiver Order⁶¹ and the underlying petition,⁶² the costs for broadband internet access in the Boulder area can be less than \$30.00.⁶³ Given the fundamental differences between the conditions at issues in the Alaska Waiver Order, and those discussed in the BVSD Petition, the Commission should reject any notion of precedent.

⁵⁸ *Id.*, ¶ 10.

⁵⁹ *Id.*, ¶ 11.

⁶⁰ *See, Boulder City Report*, pp. 21 – 25.

⁶¹ *Alaska Waiver Order*, ¶ 10 (noting that start-up costs for an internet service provider in a village is often more than \$20,000, in addition to the monthly cost for a satellite link).

⁶² *Petition of the State of Alaska for Waiver for the Utilization of Schools and Libraries Internet Point-of-Presence in Rural Remote Alaska Villages Where No Local Access Exists and Request for Declaratory Ruling*, CC Docket No. 96-45, *Request for Waiver and Declaratory Ruling*, pp. 10 – 11 (filed January 29, 2001) (noting that monthly internet subscription charges could exceed \$240 per month.)

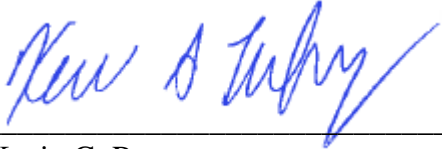
⁶³ *See, Boulder City Report*, pp. 21 – 22.

VII. Conclusion

The Petitions raise a host of legal, procedural and policy implications that must be addressed by the Commission before moving forward. Given the substantial uncertainty surrounding these issues, and their significant importance, the Commission should not move forward until the challenges they raise are fully addressed. Failure to do so would put the integrity and sustainability of the E-Rate program in jeopardy.

Respectfully submitted,

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