

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

In the Matter of )
)
Modernizing the E-rate Program for Schools and ) WC Docket No. 13-184
Libraries )

ORDER

Adopted: February 8, 2017

Released: February 8, 2017

By the Acting Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau, on its own motion,1 grants two limited waivers of the requirement to comply with certain category of service classification standards established in the funding year 2017 E-rate Eligible Services List (FY 2017 ESL).2 First, as described below, we waive the obligation to apply the FY 2017 ESL classification standards to connections provided under pre-existing multi-year contracts if doing so would change the eligibility of the connections from Category Two to Category One. Second, for funding year 2017 applications, we waive the requirement to classify connections between different schools and libraries sharing a single building as Category One services. Pursuant to this waiver, applicants may elect to seek Category Two funding for customer-owned or -controlled inside wiring that connects different schools and libraries within the same building.

2. Background. Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible services.3 Applicants must seek competitive bids for the services for which they are considering requesting support by filing FCC Form 470 for posting on the Universal Service Administrative Company's (USAC) website.4 The FCC Form 470 must specify the category of service for which bids are being sought,5 and provide a description of the service sufficient to enable potential service providers to submit responsive bids for such services.6

1 47 CFR §§ 0.91, 0.291, 1.3 (stating that the Commission may waive its rules on its own motion). Generally, waiver of the Commission's rules is appropriate if: (a) special circumstances warrant a deviation from the general rule, and (b) such deviation will serve the public interest. Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (Northeast Cellular).

2 Modernizing the E-rate Program for Schools and Libraries, WC Docket. No. 13-184, Order, 31 FCC Rcd 9767 (2016) (FY 2017 ESL). E-rate is the commonly used name for the schools and libraries universal service support mechanism.

3 47 CFR §§ 54.501-54.505.

4 47 CFR § 54.503(b)-(c).

5 47 CFR § 54.503(c)(1)(i); USAC, Filing FCC Forms 470, http://www.usac.org/res/documents/sl/pdf/e-rate-productivity-center/Filing-FCC-Form-470.pdf (last visited Jan. 9, 2017).

6 47 CFR § 54.503(c)(1)(ii); see also Federal-State Board on Universal Service, CC Docket 96-45, Report and Order, 12 FCC Rcd 8776, 9078, para. 575 (1997) (Universal Service First Report and Order) (subsequent history omitted). A failure to completely and accurately identify the services for which an applicant is seeking bids in an FCC Form 470 is a violation of the E-rate competitive bidding rules and a basis for denying a funding request.

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3. After posting the FCC Form 470, the applicant must wait 28 days before entering into a signed contract or other legally binding agreement with a service provider.<sup>7</sup> The applicant must file an FCC Form 471 once a service contract is entered to request support for the eligible services from USAC.<sup>8</sup> If the applicant indicates its intent to enter into multi-year contracts in the originating FCC Form 470, it may do so without being required to repost an FCC Form 470 and comply with the 28-day rule each year of the contract.<sup>9</sup> Regardless of whether an applicant is seeking support pursuant to a new contract or a pre-existing multi-year contract, the applicant must, in connection with each funding request, demonstrate its compliance with E-rate competitive bidding requirements by referencing an FCC Form 470 that sought bids for the category of service identified in the applicant's FCC Form 471.<sup>10</sup>

4. The Bureau annually issues an eligible services list that identifies services for which applicants may seek E-rate support.<sup>11</sup> Eligible services fall within one of two categories. Category One services are services needed to support broadband connectivity *to* schools and libraries,<sup>12</sup> including, but not limited to, wide area network (WAN) connections.<sup>13</sup> Category Two services are services needed to support broadband connectivity *within* schools and libraries,<sup>14</sup> including, but not limited to, local area network (LAN) connections and other internal connections.<sup>15</sup>

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*Petition for Reconsideration by Chicago Public Schools, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 29 FCC Rcd 9289, 9291-9292, paras. 7-8 (WCB 2014).

<sup>7</sup> 47 CFR § 54.503(c)(4).

<sup>8</sup> 47 CFR § 54.504(a).

<sup>9</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 15 FCC Rcd 6732, 6736, paras. 10-12 (1999); *Request for Review of a Decision of the Universal Service Administrator by Challis Joint School District # 181, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 26 FCC Rcd 3812, 3813, para. 2 (WCB 2011) (*Challis Order*).

<sup>10</sup> *Request for Review of a Decision of the Universal Service Administrator by Idaho Falls School District 91, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 25 FCC Rcd 5512, 5513, para. 2 (WCB 2010) (*Idaho Falls Order*); USAC, Filing the FCC Form 471, 17 (Feb. 8, 2016), <https://usac.org/res/documents/sl/pdf/window-hq/EPC-R1.2-Filing-FCC-Form-471.pdf>.

<sup>11</sup> 47 CFR § 54.502(a), (d).

<sup>12</sup> *Modernizing the E-rate Program for Schools and Libraries*, WC Docket 13-184, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 8870, 8898-8899, para. 77 (2014) (*E-rate Modernization Order*); 47 CFR § 54.502(a)(1).

<sup>13</sup> See *Federal-State Joint Board on Universal Service et al.*, CC Docket Nos. 96-45, et al., Fourth Order on Reconsideration and Report and Order, 13 FCC Rcd 5318, 5430-31, para. 193, n.585 (1997) (*Fourth Order on Recon.*) (stating that leased WAN connections are eligible for support); *Modernizing the E-rate Program for Schools and Libraries*, WC Docket 13-184, Second Report and Order and Order on Reconsideration, 29 FCC Rcd 15538, 15549-50, para. 43, n.88 (2014) (*Second E-rate Modernization Order*) (eliminating a prior prohibition on support for applicant-owned WANs). For the purposes of the E-rate program, a “wide area network” is “a voice or data network that provides connections from one or more computers within an eligible school or library to one or more computers or networks that are external to such eligible school or library. Excluded from this definition is a voice or data network that provides connections between or among instructional buildings of a single school campus or between or among non-administrative buildings of a single library branch.” 47 CFR § 54.500.

<sup>14</sup> *E-rate Modernization Order*, 29 FCC at 8898-8899, para. 77. The nomenclature for these E-rate categories of service was changed from “priority” to “Category” in the *E-rate Modernization Order*. *Id.* For ease of reference, we use the “Category” nomenclature throughout this Order.

<sup>15</sup> 47 CFR § 54.502(a)(2); *FY 2017 ESL*, 31 FCC Rcd at 9777, Appendix C. For the purposes of the E-rate program, “internal connections” are services “necessary to transport or distribute broadband within one or more instructional buildings of a single school campus or within one or more non-administrative buildings that comprise a single library branch.” 47 CFR § 54.500.

5. In the FY 2017 ESL, the Bureau explained that connections between multiple different schools and libraries are eligible for Category One support, irrespective of whether they are located on the same grounds.<sup>16</sup> The Bureau also adopted an explanation of the term “campus” as used in the E-rate definitions of a WAN and internal connections, for use in determining whether connections between instructional buildings of a single school, or the non-administrative buildings of a single library branch, should be classified as Category One or Category Two services.<sup>17</sup> Beginning in funding year 2017, connections should be classified as Category One services if they connect instructional buildings of a single school, or non-administrative buildings of a single library, located on different campuses belonging to that school or library.<sup>18</sup> Connections should be classified as Category Two services if they connect instructional buildings of a single school, or non-administrative buildings of a single library branch, located on the same campus.<sup>19</sup> In Frequently Asked Questions appended to the FY 2017 ESL, the Bureau advised that if multiple schools or libraries share a single building, the portion of the building used by each school or library is that school or library’s campus.<sup>20</sup> Accordingly, the connections between those school or library campuses would be Category One services.<sup>21</sup>

6. *Discussion.* The FY 2017 ESL standards for whether connections should be classified as Category One or Category Two services will apply to E-rate applications beginning in funding year 2017. At that time, some applicants may be receiving services under pre-existing multi-year contracts for connections that were eligible for Category Two support at the time the contracts were entered,<sup>22</sup> but will be deemed Category One services as of funding year 2017.<sup>23</sup> The applicants will not be able to seek continued support for those connections via a Category One funding request, however, because the controlling FCC Form 470s for those pre-existing multi-year contracts will identify the connections as Category Two services.<sup>24</sup> A Category One funding request for the connections would, consequently,

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<sup>16</sup> See *FY 2017 ESL*, 31 FCC Rcd at 9769, para. 7, n.18. Prior to funding year 2017, USAC determined whether a connection qualified as a Category One or Category Two service based on whether the connection crossed a public right of way. It did so because the E-rate rules previously contained a rebuttable presumption that a connection that crossed a public right-of-way was not an internal connection. See *Fourth Order on Recon.*, 13 FCC Rcd at 5430-5431, para. 193; 47 CFR § 54.502(a)(4) (2013) (including the rebuttable presumption in the definition of “internal connections”). The *E-rate Modernization Order* eliminated that rebuttable presumption from the E-rate rules. 29 FCC Rcd at 8992-8993 (amending rules to move the definition of “internal connections” to 47 CFR § 500 and exclude the rebuttable presumption from the term).

<sup>17</sup> *FY 2017 ESL*, 31 FCC Rcd at 9768-9769, para. 7. For the purposes of the E-rate rules, a “campus” is “the geographically contiguous grounds where the instructional buildings of a single eligible school are located.” *Id.*

<sup>18</sup> *FY 2017 ESL*, 31 FCC Rcd at 9769, para. 7, n.17.

<sup>19</sup> *FY 2017 ESL*, 31 FCC Rcd at 9773 Appendix B, Q5, Q6.

<sup>20</sup> *FY 2017 ESL*, 31 FCC Rcd at 9772, Appendix B, Q3.

<sup>21</sup> *Id.*

<sup>22</sup> See *supra* para. 3.

<sup>23</sup> This would be the case for applicants seeking support for connections between different schools and libraries that did not cross a public right of way prior to the issuance of the FY 2017 ESL. At that time, USAC treated any connection that did not cross a public right of way as a Category Two service. As noted in the FY 2017 ESL, such connections are now eligible for Category One support.

<sup>24</sup> We anticipate that few connections that were previously deemed eligible for Category One support would now be mandatorily classified as Category Two connections, given the flexibility provided to schools and libraries in the FY 2017 ESL to define separate campuses. *FY 2017 ESL*, 31 FCC Rcd at 9780, Appendix C (stating that “[a] single school may have multiple campuses if it has instructional buildings located on grounds that are not geographically contiguous” and that “[c]onnections between buildings on different campuses of a single school are considered to be Category One digital transmission services”). For instance, connections between instructional buildings of a single school that were previously eligible for Category One support because they crossed a public right-of-way could continue receiving Category One support under the FY 2017 ESL classification standards if the school defined the

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violate the requirement that the services requested in an FCC Form 471 match the services identified in the controlling FCC Form 470.<sup>25</sup>

7. The Bureau, therefore, finds that special circumstances exist to grant a limited waiver of the classification standards adopted in the FY 2017 ESL for applicants seeking support for services currently delivered pursuant to a multi-year contract: (a) that was entered prior to the issuance of the FY 2017 ESL pursuant to an E-rate compliant competitive bidding process; and (b) for connections that were classified as Category Two services at the time the applicant posted the controlling FCC Form 470 for the contract, but would now be classified as a Category One service under the FY 2017 ESL standards. We find that strict compliance with the FY 2017 ESL category of service classification standards in such cases would be inconsistent with the public interest.<sup>26</sup> While it is conceivable that some applicants may be able to terminate their multi-year contracts early and re-bid the connections as Category One services, many may not have that option, or may only be able to exercise it by incurring a penalty.<sup>27</sup> Although the use of a multi-year contract does not insulate applicants from changes in program rules,<sup>28</sup> including changes to the eligible services list,<sup>29</sup> we find that under the specific circumstances described above, the public interest and policy goals of the E-rate program would be better served by not requiring the affected applicants to terminate their Category Two contracts and rebid the connections as Category One services, risking disruption to connectivity that is critical for students.

8. We caution applicants that we do not extend this waiver to voluntary extensions of multi-year contracts that satisfy the two-part criteria set forth in paragraph 7 above.<sup>30</sup> Applicants that wish to seek support for the same connections after the original expiration date of such multi-year contracts must seek bids for a new contract by posting an FCC Form 470 that adheres to the program rules and eligible services list in effect for the applicable funding year.

9. The Bureau also grants a limited waiver of the FY 2017 ESL classification standards applicable to connections between different schools and libraries sharing a single building. When an applicant seeks support for internal connections within a building used by a *single* school or library, including inside wiring,<sup>31</sup> such connections are eligible for support as Category Two services.<sup>32</sup>

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grounds on which the instructional buildings were located on one side of the road as Campus A and the grounds on which the instructional buildings were located on the other side of the road as Campus B. Doing so would be permissible since the buildings are located on grounds that are not geographically contiguous (i.e., they are divided by a road), and the connections between the buildings on Campus A and Campus B would be considered to be Category One digital transmission services.

<sup>25</sup> See *Idaho Falls Order*, 25 FCC Rcd at 5516, para. 9.

<sup>26</sup> *Northeast Cellular*, 897 F.2d at 1166.

<sup>27</sup> *Request for Review of the Decision of the Universal Service Administrator by Pasadena Unified School District, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 21 FCC Rcd 2116, 2120, para. 11, n.33 (WCB 2006) (noting that a contract could not be deemed to be for a month-to-month service because the agreement imposed penalty charges on the applicant if it terminated the service). Applicants may not seek support from the E-rate program to pay early termination charges. 47 CFR § 54.502(a).

<sup>28</sup> *Petition for Waiver by South Bay Union School District, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 27 FCC Rcd 4176, 4177, para. 4 (WCB 2012) (*South Bay Order*).

<sup>29</sup> *Petition for Waiver by Sprint Corporation, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 22 FCC Rcd 5353, 5355, para. 5 (WCB 2007) (*Sprint Order*).

<sup>30</sup> A “contract with voluntary extensions” is a “contract that expires at the end of its original term, and may be voluntarily extended for one or more years pursuant to the express provisions of the contract.” *Challis Order*, 26 FCC Rcd at 3813, para. 2, n.6.

<sup>31</sup> For the purposes of this Order, inside wiring, or premises wiring, is customer-owned or controlled intra-building wiring on the applicant side of the demarcation point. See 47 CFR § 68.3.

Applicants typically own these internal connections after they are installed.<sup>33</sup> The FY 2017 ESL advises, however, that connections between different schools or libraries sharing a single building are Category One services.<sup>34</sup> To seek support for customer-owned or controlled inside wiring as a Category One service, applicants would have to comply with our rules governing self-provisioned networks.<sup>35</sup> Those rules require that applicants seeking bids for a self-provisioned network, in whole or in part, must also seek bids for the needed services provided over a third party network,<sup>36</sup> which is incongruous with inside wiring that is typically customer-owned and -controlled.<sup>37</sup> Further, identifying the intra-building Category One connections delivering service to each school or library (as opposed to within each school and library) when they share a single building network presents challenges that applicants may not be able to resolve absent further guidance from the Bureau or USAC.<sup>38</sup>

10. For these reasons, we find that the public interest would be best served by waiving the requirement to classify connections between different schools and libraries sharing a single building as Category One services for funding year 2017 applications. Pursuant to this waiver, applicants may elect to seek bids and submit funding requests for such connections as Category Two services.<sup>39</sup> Applicants may

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<sup>32</sup> *FY 2017 ESL*, 31 FCC Rcd at 9780, Appendix C; see also *Federal-State Joint Board on Universal Service*, CC Docket 96-45, Report and Order, 22 FCC Rcd 8776, 9013, paras. 455-456 (1997) (*Universal Service Order*) (stating that Congress intended E-rate discounts to be available for “wireline intraschool connections” enabling service to be delivered “all the way to the individual classrooms of a school, not merely to a single computer lab in each school or merely to the schoolhouse door”).

<sup>33</sup> See *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Request for Review by Integrated Systems and Internet Solutions, Inc., of the Decision of the Universal Service Administrator, Request for Review by Education Networks of America of the Decision of the Universal Service Administrator, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734, 13754, para. 39 (1999) (finding that applicant ownership indicates that services are internal connections and not part of a Category One data transmission or Internet access service); *Request for Review of Decisions of the Universal Service Administrator by Savannah R-III School District (MO), Schools and Libraries Universal Service Support Mechanism*, 415489, 471867, CC Docket No. 02-6, 23 FCC Rcd 12053, 12057, para. 3 (WCB 2008) (“We find that Savannah has provided the necessary evidence to show that the applicant does not own or have exclusive use of the facilities and thus is truly buying and end-to-end service rather than seeking reimbursement for an internal connection”).

<sup>34</sup> *FY 2017 ESL*, 31 FCC Rcd at 9772, Appendix B, Q3.

<sup>35</sup> The majority of services eligible for Category One support are provided over vendor-owned facilities (e.g., leased lit or leased dark fiber service). As of funding year 2016, applicants may seek E-rate support to hire a vendor to construct a network (or portion of a network) that the applicant subsequently owns and maintains, when doing so is the most cost-effective option for the applicant to obtain the bandwidth it needs. See *Second E-rate Modernization Order*, 29 FCC Rcd at 15555, paras. 43.

<sup>36</sup> 47 CFR § 54.503(c)(1)(iv).

<sup>37</sup> Moreover, we expect that the same vendors would respond to requests for inside wiring bids irrespective of whether the service is classified as Category One or Category Two.

<sup>38</sup> USAC’s website states that “the actual demarcation point between the local network and the Category One services is typically at a wiring closet or computer room within the facilities,” which it states is “consistent with historical precedent of network systems, which traditionally rely on a specific dividing line or ‘demarcation’ between a location’s inside facilities and outside facilities.” See USAC, *On Premise Category One Equipment*, <https://www.usac.org/sl/applicants/beforeyoubegin/eligible-services/category-one.aspx> (last visited Jan. 9, 2017). Neither USAC nor the Bureau has issued guidance on how applicants should identify demarcation points when multiple schools or libraries share a single building network, and the intra-building connections between those schools and libraries are classified as Category One services.

<sup>39</sup> Beyond the context of inside wiring, applicants are reminded that if a project involves both Category One and Category Two connections, they may seeking funding for the project as a Category Two service if they allocate the

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also seek bids and support for connections between different schools and libraries within the same building as Category One services, as stated in the FY 2017 ESL, if they determine that they can do so in compliance with the Commission's rules and the eligible services list for the applicable funding year.<sup>40</sup> Prior to issuing the eligible services list for funding year 2018,<sup>41</sup> the Bureau will seek comment on the eligibility category that should apply to inside wiring between different schools and libraries sharing a single building in future funding years.

11. We emphasize the limited and extraordinary nature of the waivers granted in this Order. We reiterate the importance of correctly classifying eligible services as Category One or Category Two services, particularly in light of the measures taken in the *E-rate Modernization Order* to provide schools and libraries more equitable access to funding for Category Two Wi-Fi networks and other internal connections.<sup>42</sup> We remind applicants of their responsibility to ensure that their requests satisfy program rules, which limit E-rate support to services identified on the annual eligible services list,<sup>43</sup> require applicants to seek competitive bids for such services by sufficiently identifying and describing them in a posted FCC Form 470 before submitting a funding request,<sup>44</sup> and only permit the grant of funding if the services described in the FCC Form 470 match those requested in the applicant's funding application.<sup>45</sup> Moreover, we underscore that our grant of the two waivers described in this Order is limited to the specific circumstances herein, and should not be construed as a departure from our rules governing the classification of eligible services not mentioned in this Order, or our rules applicable to multi-year contracts generally. While applicants and service providers may enter into multi-year contracts, the E-rate program is funded on a year-to-year basis.<sup>46</sup> A multi-year contract does not insulate applicants and service providers from changes in program rules, including changes to the eligible services list,<sup>47</sup> and this Order should not be construed to suggest otherwise. Indeed, E-rate program rules do not guarantee that a multi-year contract will continue to be funded for the duration of the contract.<sup>48</sup>

12. Finally, we are committed to guarding against waste, fraud, and abuse, and ensuring that funds disbursed through the E-rate program are used for appropriate purposes. Although we grant the limited waivers described herein, we reserve the right to conduct audits and investigations to determine compliance with the E-rate program rules and requirements. Because audits and investigations may provide information showing that a beneficiary or service provider failed to comply with the statute or

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costs of the Category One connections out of the funding request in a manner consistent with program rules and procedures. See 47 CFR § 54.504(e).

<sup>40</sup> Because we are providing applicants with the option of seeking Category Two support for inside wiring between different schools or libraries sharing a single building, applicants that may have already posted funding year 2017 FCC Form 470s seeking bids for such connections as a Category One service may either: (a) post a superseding FCC Form 470 seeking bids for the connections as a Category Two service, and wait the required 28-days before entering an agreement with a service provider; or (b) continue with their existing FCC Form 470 because they have determined that the circumstances of the particular build allow them to comply with our rules applicable to Category One connections.

<sup>41</sup> 47 CFR § 54.502(a), (d).

<sup>42</sup> See *E-rate Modernization Order*, 29 FCC Rcd. at 8898-8916, paras. 76-118; *Second E-rate Modernization Order*, 29 FCC Rcd at 15571-78, paras. 82-100.

<sup>43</sup> 47 CFR § 54.502(a).

<sup>44</sup> 47 CFR § 54.503(b)-(c).

<sup>45</sup> *Idaho Falls Order*, 25 FCC Rcd at 5513, para. 2.

<sup>46</sup> See, e.g., *Universal Service First Report and Order*, 12 FCC Rcd at 9062, para. 544.

<sup>47</sup> *South Bay Order*, 27 FCC Rcd at 4177, para. 4.

<sup>48</sup> *Id.*; *Sprint Order*, 22 FCC Rcd at 5355, para. 5.

Commission rules, such proceedings can reveal instances in which universal service funds were improperly disbursed or in a manner inconsistent with the statute or the Commission's rules. We will require USAC to recover funds that we discover were not used properly through its normal processes. We emphasize that we retain the discretion to evaluate the uses of monies disbursed through the E-rate program and to determine on a case-by-case basis that waste, fraud, or abuse of program funds occurred and that recovery is warranted. We remain committed to ensuring the integrity of the program and will continue to aggressively pursue instances of waste, fraud, or abuse under our own procedures and in cooperation with law enforcement agencies.

## II. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that, pursuant to sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, 47 CFR § 54.502(a) IS WAIVED to the extent described above.

14. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith  
Acting Chief  
Wireline Competition Bureau