



July 12, 2023

SUBMITTED ELECTRONICALLY VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: Ex Parte Filing

Schools and Libraries Universal Support Mechanism, CC Docket No. 02-6
Federal-State Joint Board on Universal Service, CC Docket No. 96-45
Changes to the Board of Directors of the National Exchange Carrier Association, Inc.,
CC Docket No. 97-21

Dear Madam Secretary:

Pursuant to Federal Communications Commission's *ex parte* rules, I hereby submit this summary of the following meetings concerning FCC-CIRC2307-01, Draft Report and Order and Further Notice of Proposed Rulemaking on Improving the E-Rate Rules and Processes for Tribal Applicants in the above-listed dockets (Draft Order) (FNPRM):

- July 10, 2023, conversation with Elizabeth Cuttner, Office of Chairwoman Jessica Rosenworcel;
- July 11, 2023, conversation with Marco Peraza, Wireline Advisor, Office of Commissioner Nathan Simington;
- July 11, 2023, conversation with Kate Dumouchel, Johnny Roddy, Molly O'Connor, and Gabriela Gross of the Wireline Competition Bureau;¹ and
- July 12, 2023, conversation with Justin Faulb, Chief of Staff and Legal Advisor for Wireline and National Security, Office of Commissioner Geoffrey Starks.

The following individuals participated in the above-mentioned calls along with the undersigned:

- John Windhausen, Jr., Executive Director, SHLB;
- Gina Spade, Principal, Broadband Legal Strategies, LLC;
- Debra Kriete, South Dakota State E-rate Coordinator and Chairperson of State E-rate Coordinators' Alliance;²

¹ Ms. Spade had a separate call with Kate Dumouchel, on July 12, regarding the USAC repayment process.

² Ms. Kriete was not present on the July 11th call with the Wireline Competition Bureau.

- Jeannene Hurley, Sound E-rate, Inc.;
- Malavika Muralidharan, E-rate Administrator for Public Libraries, Arizona State Library, Archives & Public Records;
- Cathy Benham, CSM Consulting and member of SECA on behalf of California public schools and E-rate consultant for California's research and education network (CENIC);³ and
- Kimberly Friends, VP, CSM Consulting.⁴

The Schools, Health & Libraries Broadband Coalition (SHLB) applauds the Commission for initiating this proceeding and believes that many of the items in the draft Order will greatly advance the E-rate Program and benefit applicants. We are also pleased that the Commission is seeking comment on various items that it and other organizations supported to streamline the program.⁵ To further continue to improve the program, SHLB believes that there are several important suggestions and additional topics that the Commission should address in the draft Order and FNPRM.

SHLB requests that the Commission add or revise the following items in the draft Order:

1. **The Commission should apply the Category Two competitive bidding exemption to schools as well as libraries.** In Paragraphs 19 and 20 of the Draft Order, the Commission adopts a competitive bidding exemption for all library applicants seeking support for category two equipment or services that total a pre-discounted amount of \$3,600 or less in a single funding year. We ask that the Commission extend this opportunity to schools (as well as libraries) under the same rules and guidelines. We note that this item was not recommended previously by any party that submitted comments. If the Commission requires further evidence on record for this item, we ask that it implement this expansion on an interim basis and seek further comment in the draft FNPRM.
2. **The Commission should clarify that the 10 percent safe harbor for ineligible use of Internet services includes all Category One eligible Data Transmission and/or Internet Access services.** In Paragraph 27 of the draft Order, the Commission proposes a 10 percent safe harbor for ineligible use of Internet service as long as at least 90 percent

³ Ms. Benham was not present on the July 12th call with Justin Faulb.

⁴ Ms. Friends was not present on the July 10th call with Elizabeth Cuttner or July 11th call with Marco Peraza.

⁵ The State E-rate Coordinators' Alliance ("SECA"), SHLB, the Consortium for School Networking ("CoSN") and the State Educational Technology Directors Association ("SETDA"), together referred to as the "Joint Commenters," filed comments in the above-listed dockets, covering multiple topics. See Comments of SECA, et al., *In the Matter of Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 and *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket No. 97-21 (Apr. 24, 2023) (Joint Comments) <https://www.fcc.gov/ecfs/document/10424042123331/1>.

of requested Internet service is being used for eligible purposes. We greatly support the Commission's allowance of a safe harbor but ask for an expansion of the language "Internet service" as used in this Paragraph. Specifically, we ask the Commission to expand the language "Internet service" to include all Category One eligible Data Transmission and/or Internet Access services.⁶ Many schools and libraries connect to statewide networks via broadband transport that does not include the cost of Internet service. These connections are classified by the Commission as data transmission and not Internet access in the E-rate program. The clarification that the safe harbor applies to all Category One Data Transmission and/or Internet Access services will eliminate confusion, be consistent with the definitions in the Eligible Services List, and comport with what we believe is the intent of the Commission in offering this relief.

3. **The Commission should clarify that the 10% safe harbor for ineligible uses applies also to Pre-k and adult education.**⁷ In Paragraph 26 of the draft Order there are numerous examples provided of ineligible uses that would qualify for the 90% safe harbor provision described in paragraph 27, that is, provided that 90% of the usage is eligible, the remaining ineligible portion is presumed to be ancillary. In some states, pre-kindergarten and/or adult education is not included in the state's definition of elementary and/or secondary education, and therefore, services or equipment used by these learners is ineligible. These students should be included in the description of potentially ineligible uses that may benefit from the 90% safe harbor provision.
4. **The Commission should apply the cost allocation standards proposed for cabling to any equipment listed on the Eligible Services List.**⁸ In Paragraph 29 of the draft Order, the Commission addresses concerns made by the Joint Commenters regarding current cost allocation requirements for expenses associated with cabling that is primarily being used to provide broadband connectivity within schools and libraries. We are supportive of the Commission's provision clarifying that cabling "drops" or "jacks" that are part of a local area network primarily serving an eligible purpose are eligible for E-Rate and do not require cost allocation. Upon further analysis on this issue, we understand that other types of equipment in addition to cabling, such as switches, may also connect to E-rate ineligible equipment but would nonetheless be part of a local area network primarily serving an eligible purpose. Accordingly, we ask the Commission to apply the same cost

⁶ We suggest the following language: "As a means of providing a safe harbor, we adopt a presumption that if at least 90% of an applicant's requested Internet service **and all Category One eligible Data Transmission and/or Internet Access services** is being used for eligible purposes, the remaining ineligible use of the Internet service **and all Category One eligible Data Transmission and/or Internet Access services** will be presumed to be ancillary and, therefore, cost allocation is not required."

⁷ The participants did not raise this issue on any of the above-mentioned calls but incorporates it now into their suggested recommendations.

⁸ The participants did not raise this issue during the call with Elizabeth Cuttner but incorporates it into their suggested recommendations.

allocation standards set forth for cabling to any equipment (such as switches) that are primarily being used to provide broadband connectivity within schools and libraries where other, ineligible equipment is connected to it.

5. **SHLB recommends that the Commission clarify it is not changing any of its “community use” rules in revising the cost-allocation requirements (§ 27).**⁹

SHLB requests that the Commission add the following items to the draft FNPRM:

1. **Invoicing**

SHLB applauds the Commission’s review of the invoicing deadline rule, as the Commission has noted that many applicants and service providers have unnecessarily lost funding due to the strict waiver requirement adopted in 2014.

- a. **The Commission should take immediate action to provide program participants relief on the invoicing deadline rules while considering long-term changes.** While the NPRM is pending, we ask the Commission to waive its own rule, 47 C.F.R. §54.514(b), on its own motion, and allow for extensions to be granted automatically if an extension request or associated invoice¹⁰ is submitted no later than the 15th day after the original deadline, pending the completion of the FNPRM. We note that the Commission may waive its own regulations while considering changes to its rules, and that there is precedent for doing so.¹¹ We believe that immediate, limited relief from the punitive impact of the existing regulation is likewise in the public interest.

⁹ *Schools and Libraries Universal Service Support Mechanism, A National Broadband Plan for Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Sixth Report and Order, 25 FCC Rcd 18762, 18773-18777 (2010). The participants did not raise this issue on any of the above-mentioned calls but incorporates it now into their suggested recommendations.

¹⁰ It is equally important to clarify that this provision should apply to late-filed *invoices* submitted within 15 days of the original deadline in addition to late extension requests. Stakeholders may not be aware that they missed the deadline and therefore may file the invoice within 15 days of the original deadline but may not have first requested the extension of the deadline. They may receive the invoice rejection letter (\$0 paid) after the 15-day grace period, thereby denying the ability to leverage the 15-day grace period.

¹¹ The Commission waived the prohibition against community use of E-Rate funded services while seeking comment on the prospect of permanently changing the regulation and also waived the requirement for amortization of special construction charges over four years, on an interim basis, pending comment on whether to permanently rescind the four-year special construction amortization requirement. In February 2010, in the E-rate Community Use Order and NPRM, **on its own motion**, the FCC waived sections 54.504(b)(2)(v) and 54.504(c)(1)(vii) of the existing rules, which required applicants to certify on their FCC Forms 470 and 471 that the services requested will be used solely for educational purposes. *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order and Notice of Proposed Rulemaking, 25 FCC Rcd 1740 (2010) (E-rate Community Use Order and NPRM); 47 C.F.R. §§ 54.504(b)(2)(v), 54.504(c)(1)(vii) (2009). The FCC extended this waiver through the close of funding year 2010 (June 30, 2011). The waiver allowed schools to open their facilities, when classes are not in

In addition, or alternatively, the Commission should direct the Bureau to pause using the current “extraordinary circumstances” standard that is only used to evaluate whether a waiver of the invoicing deadline is warranted.¹² The current extraordinary circumstances standard that governs such waivers is extremely narrow and difficult to meet, which results in the denial of most invoice deadline extension waivers and deprives stakeholders of the benefit of their E-rate funding. Instead, the Commission should use the same public interest standard used to evaluate all other requests seeking waivers of E-rate rules.

b. The Commission should seek further comment on additional invoicing issues.

First, in Paragraph 70 of the draft FNPRM, the Commission seeks comment on the Joint Commenters’ proposal to allow applicants to file an extension of the original invoice deadline when the request is made within 15 days of the original invoice filing deadline date. In addition, we ask that the Commission seek comment on whether this change could additionally apply for applicants that filed an *invoice* within 15 days of the original invoice filing deadline.

The Commission also should seek comment on eliminating the “extraordinary circumstances” standard permanently, instead reverting to the regular public interest standard for invoicing deadline waiver requests.¹³ There is simply no reason why applicants and service providers have to meet a stricter standard for what are, at most, minor, procedural errors. SHLB would also suggest that the Commission seek comment on whether the Commission can delegate authority to USAC to accept late-filed invoices in some circumstances and if so, under what circumstances such action might be appropriate.

session, to the general public to utilize services and facilities supported by E-rate. At the same time, the Commission also sought comment on whether to make this change permanent in a NPRM. Later, the change was ordered to be made permanently in *Schools and Libraries Universal Service Support Mechanism*, Sixth Report and Order, WC Docket No. 02-6, 25 FCC Rcd 18762, 18775-76, paras. 25-26 (2010). In addition, in the Second 2014 Modernization Order, the Commission suspended temporarily the requirement to amortize special construction charges that were \$500,000 or more over a four-year period. *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Second Report and Order and Order on Reconsideration, 29 FCC Rcd 15538 (19)(2014), paras. 17-21. The FCC then initiated a Notice of Proposed Rulemaking to eliminate the amortization requirement permanently, while the suspension of the requirement continued in effect. *E-Rate Program Amortization Requirement*, Notice of Proposed Rulemaking, 34 FCC Rcd 785 (4), WC Docket 19-2, FCC 19-5 (2019). In 2020, the Commission permanently eliminated the requirement. *E-Rate Program Amortization Requirement*, 35 FCC Rcd 672 (1), WC Docket No. 19-2, (2020).

¹² The participants did not raise this issue during the call with Elizabeth Cuttner but incorporates it into their suggested recommendations.

¹³ The participants did not raise this issue during the call with Elizabeth Cuttner but incorporates it into their suggested recommendations.

2. **Category Two Rolling Deadline.** The Commission should request comments on schools and libraries with low utilization of the Category Two budgets and whether a rolling Category Two application deadline would encourage increased usage of Category Two funds.¹⁴ Some applicants are under-utilizing their Category Two budgets because the E-rate application cycle does not mirror the timing of their equipment procurement process. For example, the need for and timing of a school or library upgrade or project may depend on multiple factors, including: building construction/repairs; City/District/County approvals at Council meetings, which may not match up with E-Rate cycles, especially when multiple agenda items compete for attention at council meetings; approval of non-discounted share funding; equipment replacement; and IT personnel availability. A rolling Category Two application process would allow applicants to submit funding requests when the need arose or when they had available funding. In addition, a rolling application process for Category Two could help many applicants (especially small/rural/tribal libraries that have small staffing) who might forego submitting a Category Two application to be able to focus on submitting its Category One application by the deadline. We further note that a rolling deadline could provide relief to USAC because all applications for both Category One and Category Two will not be filed at the same time.

Accordingly, we ask the Commission to seek further comment on data tied to utilization of Category Two budgets, factors that might cause an applicant to forgo applying for Category Two expenses by the current E-rate deadline, and whether a rolling Category Two application deadline would help schools and libraries better utilize their Category Two budgets and what such a change would look like. Seeking comment in this FNPRM would allow the Commission additional time for consideration before the end of the current five-year budget cycle.

3. **Funding Recovery Process.** The Commission also should seek comment on how to streamline and clarify the recovery process with the goal of establishing clear, transparent, and streamlined program rules for the recovery of funds. In 2000, the Commission issued an order adopting USAC's plan to collect E-rate universal service funds that were erroneously disbursed.¹⁵ In that order, the Commission described the recovery process, including the issuance of demand letters by the Commission.¹⁶ The Commission no longer follows the process outlined in the *Recovery Process Order*, but has not ever publicly revisited the issue to update its rules and procedures. In addition,

¹⁴ We note that SECA has not taken a position on this item.

¹⁵ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45, Order, 15 FCC Rcd 22975, (2000) (*2000 Commitment Adjustment Order*); see also *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45, Order, FCC 99-291, 12 FCC Rcd 18400 (1999).

¹⁶ *Id.*

since the release of the *Recovery Process Order*, the Commission has revised many of its E-rate rules, including changing the deadline for appeals, among other things, such that some of the time periods outlined in the *Recovery Process Order* are no longer applicable. Each year USAC submits to the Commission procedures which include procedures for recovering funding, but it is high-level and does not provide detail on the various stages of recovery.¹⁷

In addition, there are many aspects of the recovery process that are not transparent or inconsistent. For example, USAC issues commitment adjustment letters (COMADs) to applicants when the committed funding amount is incorrect. Those letters state that the applicant or service provider should submit an appeal if they disagree with the commitment adjustment, but they also say that if recovery is warranted, USAC will issue a separate letter, presumably a Recovery of Improperly Disbursed Funds (RIDF) letter. However, USAC does not always issue a RIDF letter and sometimes immediately issues a demand for payment letter. Further complicating the process, program participants do not always receive these notifications from USAC in a timely or uniform manner, with some correspondence posted in participant’s E-rate Productivity Center (EPC) portal, some being sent by email, and others sent through U.S. mail. This process results in confusion for applicants and service providers, which can delay repayment or cause program participants to submit their appeals late.

3. **“Red Light” Rule as Applied to E-rate Applicants.** The Commission should also seek comment on an reexamination of its decision to dismiss pending E-rate submissions if a participant is on red light status.¹⁸ In 2003, the Commission adopted a rule providing that “the Commission shall withhold action on any application or request for benefits made by an entity that is delinquent in its non-tax debts owed to the Commission and shall dismiss such applications or requests if the delinquent debt is not resolved.”¹⁹ The Commission applied that decision in the E-rate context by directing USAC to dismiss pending “requests for funding commitments” if not paid “within 30 days of the notice provided for in our commitment adjustment procedures.”²⁰

While the Commission’s stated goal was to “strengthen incentives” for compliance with program rules, unfortunately, the Commission’s directive to dismiss pending applications as applied has resulted in arbitrary and punitive results. Due to the timing of the annual E-rate application filing window, dismissal of a pending funding request after the funding

¹⁷ See Universal Service Administrative Company, Schools and Libraries Program, Administrative Procedures, CC Docket No. 02-6 (filed October 31, 2022).

¹⁸ *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order, 19 FCC Rcd 15808, 15823 ¶ 42. (2004) (*Fifth Report and Order*).

¹⁹ *Id.* at 41.

²⁰ *Id.* Because the commitment adjustment procedures have changed since 2004, it is unclear what notice starts the 30-day clock.

window has closed may result in the loss of all E-rate support for the applicant for the entire funding year, even if the debt is paid shortly after the deadline issued by USAC.²¹ Similarly, dismissed invoices may not be resubmitted after the invoice filing deadline has passed. This results in E-rate participants sustaining a significant monetary penalty of thousands of dollars that cannot be restored after their red light debt is paid.

Applicants may be hindered in their attempts to promptly pay due to difficulties in timely obtaining from USAC additional information about the recovery requested, particularly when the recovery pertains to funding that was committed or issued many years prior, or they may simply need additional time to obtain internal approval to pay. The Commission has acknowledged that schools and libraries may have administrative requirements and hurdles that delay their ability promptly to repay funding recovery amounts, stating “we expressly recognize that a school or library’s ability to pay outstanding debts may be dependent on action by state or local officials on budgetary requests, and the timing of such budgetary action may be considered in determining satisfactory repayment options.”²² Given this, the Commission should seek comment on whether deferring action on pending E-rate submissions without dismissing them would be appropriate while participants are on red light status, as this would allow Tribal libraries and other participants to receive E-rate support after their debt has been fully paid. In the alternative, the Commission could seek comment on providing additional time for applicants and service providers to pay after receiving actual notice of the debt to the government.

4. **The Commission should update the draft FNPRM to provide Forms 470, 471, and 486 (or links to the same) in an appendix.**²³ In the draft FNPRM, the Commission seeks comment on various Forms, including Form 470, 471, and 486. We ask that the Commission either provide copies of these forms, or links to them, as they currently exist, in an appendix to the draft FNPRM. We believe that this would be helpful for applicants and potential commenters that might not know where to find such information on their own. (¶¶ 60-67)


²¹ Sometimes the dismissal comes months after the funding commitment should have been issued by USAC; that is, if the funding request had been timely processed, it would not have been pending when the red light rule applied.

²² *Fifth Report and Order*, 19 FCC Rcd 15808, 15823 ¶ 42.

²³ The participants did not raise this issue during the call with Elizabeth Cuttner or Justin Faulb but incorporates it into their suggested recommendations.

Please let us know if you have any questions.

Sincerely,



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