

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

In the Matter of)	
)	
Schools and Libraries Universal Service Support Mechanism)	CC Docket No. 02-6
)	
A National Broadband Plan For Our Future)	GN Docket No. 09-51

**Comments of Jive Communications, Inc. on the Draft Eligible Services
List for the Schools And Libraries Universal Service Program**

Jive Communications, Inc. (“Jive”) hereby submits these comments in response to the Public Notice (the “Public Notice”) issued by the Wireline Competition Bureau (“Bureau”) in the above-captioned proceedings publishing the draft Eligible Services List (“ESL”) to govern funding commitments under the Schools and Libraries Universal Service Support Mechanism (“E-Rate”) for Funding Year (“FY”) 2013.¹

Introduction and Background

Founded in 2006, Jive is a provider of interconnected Hosted Voice over Internet Protocol (“VoIP”), among other services, to institutional and enterprise customers. Jive began participating in the E-Rate program for FY 2010, and its E-Rate business has grown steadily since that time. For FY 2012, Jive is the service provider named in 154 funding requests spanning 26 states and totaling over \$6.2 million.

Jive offers its Hosted VoIP services to institutional and other enterprise customers in conjunction with a selection of Cisco and Polycom handsets and related hardware. After careful

¹ Public Notice, CC Docket No. 02-6, GN Docket No. 09-51, *Wireline Competition Bureau Seeks Comment on Draft Eligible Services List for Schools and Libraries Universal Service Program*, DA 12-1052, 27 FCC Rcd 7405 (Wir. Comp. Bur. 2012).

examination of the Commission's *Sixth Report and Order*,² the Bureau's *Clarification Order*,³ and USAC's response to Jive's submission for clarification to USAC's Client Services Bureau, in 2012, Jive began offering customers that purchase Jive Hosted VoIP service with a 36-month term commitment access to a limited selection of free handsets to use with the service.

Customers that do not make the 36-month service commitment must purchase the handsets separately, but receive the same rate for Jive's Hosted VoIP services as similar customers making the 36-month term commitment. Jive makes these offers available to all of its institutional or enterprise customers, including E-Rate applicants, without distinction. Based on Jive's understanding, its competitors structure their product and service offerings in a similar manner. Indeed, it has become standard in the industry for providers to offer free VoIP handsets (or cell phones) to customers that commit to a multi-year contract.

Thus, in adopting new rules in the *Sixth Report and Order* to govern the giving of gifts from service providers to E-Rate applicants,⁴ the Commission also took the opportunity to remove a disadvantage faced by E-rate applicants in comparison to other market segments with respect to their receipt of free equipment, such as handsets or cell phones. The Commission's cost allocation rule, as previously in effect, required cost allocation between eligible Priority One services and ineligible equipment, even if free, provided in connection with those services.⁵

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

³ *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 10-2355, 25 FCC Rcd 17324 (Wir. Comp. Bur. 2010) ("*Clarification Order*").

⁴ *Sixth Report and Order* at ¶¶ 87-90.

⁵ 47 C.F.R. § 54.504(e); see also USAC: Free Services Advisory, available at: <http://www.usac.org/sl/applicants/step02/free-services-advisory.aspx> (last visited Aug. 6, 2012) ("Applicants and service providers are prohibited from using Schools and Libraries Program support to subsidize the procurement of ineligible or unrequested products and

Thus, the rule prevented E-Rate applicants uniquely from taking full advantage of this common industry practice.

The new Commission policy permits the inclusion of such end user components in E-Rate contracts without cost allocation if certain requirements are met. Explaining the limits of the new gift rules contained in the *Sixth Report and Order*, the Commission stated that, “[i]f contributions have no relationship to the procurement of E-rate eligible services and are not given by service providers to circumvent our rules, including rules that require schools and libraries to pay their own non-discount share for the services they are purchasing, such contributions will not violate the prohibition against gift-giving.”⁶

Implementing this language, the Bureau subsequently explained that the *Sixth Report and Order* limits the scope of the cost allocation requirements to cases where service providers “offer special equipment discounts or equipment with service arrangements to E-rate recipients that are not currently available to some other class of subscribers or segment of the public.”⁷ Based on this analysis, the Bureau offered as an example that:

[M]any cell phones are free or available to the general public at a discounted price with the purchase of a two-year service contract. Schools and libraries are free to take advantage of these deals, without cost allocation, but cannot accept other equipment with service arrangements that are not otherwise available to some segment of the public or class of users. Therefore, a service provider may not offer free iPads to a school with the purchase of telecommunications or Internet access services eligible under E-rate, if such an arrangement is not currently available to the public or a designated class of subscribers.⁸

services or from participating in arrangements that have the effect of providing a discount level to applicant(s) greater than that to which the applicant(s) are entitled.”).

⁶ *Sixth Report and Order* at ¶ 90.

⁷ *Clarification Order* at ¶ 11.

⁸ *Id.* at ¶ 11 n. 25.

Since that Bureau *Clarification Order* was issued, USAC and E-Rate program participants alike have struggled to understand the precise scope and implementation of this policy refinement.⁹ At present, USAC appears to be withholding decisions on funding requests that involve “free” handsets, even though these funding requests are consistent with the Commission’s refinement to its cost allocation policy.

Discussion

Amendments to the FY 2013 ESL. In these comments, Jive requests that the Commission incorporate language into the FY 2013 ESL to recognize the exception established by the Commission’s *Sixth Report and Order* and the Bureau’s *Clarification Order*¹⁰ to the cost allocation requirements contained in Section 54.504(e) of the Commission’s rules, 47 C.F.R. § 54.504(e) and the Free Services Advisory¹¹ published by the Universal Service Administrative Company (“USAC”), the Commission’s E-Rate program administrator.

Current uncertainty regarding the precise interplay between the cost allocation requirement and the *Clarification Order* is creating significant disruption for E-Rate applicants and service providers alike. Service providers, including Jive, are experiencing significant disruption to their businesses as a result of delays in obtaining funding commitments and

⁹ See, e.g., State E-Rate Coordinators Alliance, Petition for Clarification Pertaining to the Eligibility of Free VoIP Handsets and Other End-User Equipment, CC Docket No. 02-6, GN Docket No. 09-51 (filed July 27, 2012) (“SECA Petition”); Letter from Mel Blackwell, Vice President, Schools and Libraries Division, to Sharon Gillett, Chief, Wireline Competition Bureau, “Request for Guidance on Rules Governing Gifts in the E-rate Program,” CC Docket No. 02-6 (filed Aug. 5, 2011).

¹⁰ *Clarification Order* at ¶ 11 n. 25.

¹¹ USAC: Free Services Advisory, at <http://www.usac.org/sl/applicants/step02/free-services-advisory.aspx> (last visited Aug. 6, 2012) (“Applicants and service providers are prohibited from using Schools and Libraries Program support to subsidize the procurement of ineligible or unrequested products and services or from participating in arrangements that have the effect of providing a discount level to applicant(s) greater than that to which the applicant(s) are entitled.”).

disbursements. Applicants undoubtedly face uncertainty and substantial legal risk surrounding their evaluation and selection of bids they may receive in response to their Form 470 postings that include offers of free equipment that meets the circumstances described by the Bureau.

Going into the FY 2013 procurement cycle, it is critical that the Commission include clear guidance in the ESL to reflect the new limits on the need for cost allocation articulated in the *Sixth Report and Order* and *Clarification Order*. By doing so the Commission can avert countless disputes that will otherwise inevitably produce bid protests, funding delays, commitment adjustments, audit findings, and other costly compliance issues across the E-Rate program.

To avert these issues, at least with respect to FY2013, Jive therefore urges the Commission to adopt the following addition to page 7 of the draft FY 2013 ESL (addition shown in italics):

The following charges are **NOT ELIGIBLE** for E-rate support:

-End User Equipment. Support is not available for end-user equipment. E-rate applicants may, however, accept free end user equipment without cost allocation if the equipment offer is available to some other class of subscribers or segment of the public on the same terms and conditions, and the underlying service to which the equipment relates is the most cost effective without regard to the otherwise ineligible equipment components.

Jive believes that the free handsets it provides with a customer's 36-month commitment to its Hosted VoIP service offering fully meet this standard. Indeed, this structure is a specific implementation of the free mobile handset example offered by the Bureau in the *Clarification Order*. Jive offers free devices to any customer – E-Rate or otherwise – that signs a 36-month contract for its services. The price of the Hosted VoIP service is the same, regardless of whether the customer accepts this offer; in the case of shorter-term contracts, the customer pays no higher rate for service, but is required to purchase or lease the necessary equipment separately.

Further, the cost of Jive's Hosted VoIP services is lower today than it was even one year ago. Not only does this provide independent confirmation that Jive is not inflating service rates to

cover the cost of the free equipment, but it also conclusively shows that the 36-month commitment that includes free equipment is the most cost-effective way to purchase Jive services.

Preliminary Review of the SECA Petition. In its Petition, SECA asks for clarification that the scope of the Commission’s refinements to its cost allocation policy is limited to the following circumstances:

- The cost of any end-user equipment provided as a part of a bundled service must be considered “ancillary” relative to the cost of the bundle as a whole;
- The bundled service offering must be deemed a commercially common practice within the industry, not a unique offering of an individual service provider;
- The arrangement must be currently available to the public and not just to a designated class of subscribers. For example, a special bundle available only to the K-12 market that is not available to all other customers should not qualify for the cost allocation exemption; and
- The service provider is not permitted to offer a package or packages of equivalent eligible services, without bundled end-user equipment, at a lower price.¹²

Jive appreciates SECA’s thoughtful discussion of these issues and will file more fulsome comments if the Commission establishes a formal pleading cycle for the SECA Petition. Jive agrees that the Commission can and should further define the scope of the new cost allocation policy refinements, to ensure that the “cell phone” exception does not swallow the rule.

Nevertheless, Jive urges the Commission not to delay in amending the FY 2013 ESL as Jive requests above. Delaying such critical guidance would cause substantial harm to the E-Rate program, as described above, by allowing the “perfect to be the enemy of the good.”

In general, Jive believes that, while the SECA Petition offers a thoughtful starting point and would resolve some implementation issues, the criteria SECA proposes would also raise implementation issues of their own. For example, the first criterion – “ancillary cost” – bears an

¹² SECA Petition at 3.

uncertain relationship to the Commission's existing "ancillary use" rule.¹³ Of course, to the extent that a free handset or other piece of equipment met the ancillary use test, no cost allocation would be required at all. To the extent that SECA advocates sole focus on the cost of the equipment, or a requirement that the equipment cannot be priced separately, however, Jive believes that this focus departs from the Commission's intent, as manifested in the example of a mobile phone offered in the *Clarification Order*. Standalone pricing for end-user handsets is readily available for both mobile and VoIP equipment; thus adoption of this criterion could undermine the validity of the Bureau's example.

With respect to the second criterion – "commercially common practice within the industry" – Jive again would urge caution in implementing this or any similar criterion. Nothing in the *Sixth Report and Order* or *Clarification Order* suggests that this refinement to the cost allocation policy should be limited to cases where the practice is common within the industry. Furthermore, Jive is concerned that such a restriction could stifle creativity and development of new service offerings. While service providers commonly offer free mobile and VoIP handsets today to customers making a term commitment, industry practices evolve over time. The SECA Petition offers no definition of "common," nor does it explain how USAC would identify or communicate over time which marketing practices have emerged as "common" within the industry and therefore should be considered exempt from cost allocation.

The third criterion – "available to the public" – again raises implementation issues. The *Clarification Order* establishes that the free equipment offer must be available to "class of

¹³ 47 C.F.R. § 54.504(e)(2) ("An ineligible component is 'ancillary' if a price for the ineligible component cannot be determined separately and independently from the price of the eligible components, and the specific package remains the most cost-effective means of receiving the eligible services, without regard to the value of the ineligible functionality.").

subscribers or segment of the public.”¹⁴ While Jive agrees that an offer that is available generally to every member of the public would qualify, the *Clarification Order* establishes that offers to narrower classes of customers may do so as well.

Finally, with respect to the fourth criterion – “no packages of equivalent eligible services, without bundled end-user equipment, at a lower price” – Jive generally agrees with this concept, but would urge the Commission to make clear that it applies only across similarly situated customers. In Jive’s experience, for example, it is entirely possible that a customer purchasing a 10,000-line package may very well be paying a lower price, with or without phones, from one purchasing 50 lines. These variations have nothing to do with free equipment, but stem from well-recognized principles of cost causation, such as the relative economies of scale that service providers can bring to bear in serving larger volume customers, the complexity of the engagement, the level of competitive price pressure present in individual geographic markets, and other factors.

¹⁴ *Clarification Order* at ¶ 11.

Conclusion

For the foregoing reasons, Jive urges the Commission to amend the ESL to implement the Commission's recent refinements to its cost allocation policy, as described more fully herein.

Respectfully submitted,

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