

**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
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	

REPORT AND ORDER

Adopted: September 27, 2012

Released: September 27, 2012

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we release the eligible services list (ESL) for funding year 2013 for the schools and libraries universal service support program (more commonly referred to as the E-rate program)¹ and authorize the Universal Service Administrative Company (USAC) to open the annual application filing window no earlier than November 26, 2012.² We revise the ESL for funding year 2013 by consolidating all Priority One services into a single list to reduce regulatory and administrative burdens on applicants. We also make some other minor modifications to the ESL.

II. BACKGROUND

2. Section 254 of the Act gives the Commission authority to designate “telecommunications services” and additional services as eligible for support under the E-rate program.³ In the *Universal Service First Report and Order*, the Commission designated all commercially available telecommunications services as services eligible for support (or discounts) under the E-rate program.⁴ In the same decision, the Commission concluded that it would provide E-rate support for additional, non-telecommunications services, particularly Internet access, email, and internal connections, provided by both telecommunications carriers and non-telecommunications carriers, pursuant to sections 4(i) and 254(c)(1), (c)(3), (h)(1)(B), and (h)(2).⁵ The Commission reasoned that such services enhance access to

¹ See *Eligible Services List for Funding Year 2013* (rel. Sept. 27, 2012) (*2013 ESL*) (Appendix B). The ESL specifies the services and products that are eligible for E-rate discounts.

² 47 C.F.R. § 54.502(b).

³ 47 U.S.C. § 254(c)(1), (c)(3), (h)(1)(B), and (h)(2)(A). Congress charged the Commission with establishing competitively neutral rules to enhance access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms and libraries, and also provided the Commission with the authority to designate “special” or “additional” services eligible for universal service support for schools and libraries. 47 U.S.C. § 254(c)(3).

⁴ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9006-08, paras. 431-34 (1997) (*Universal Service First Report and Order*), *aff’d in part*, *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (subsequent history omitted); *see also* 47 U.S.C. § 254(c)(1) and (c)(3).

⁵ *Universal Service First Report and Order*, 12 FCC Rcd at 9008-15, paras. 436-39, and 9084-90, paras. 589-600.

advanced telecommunications and information services for public and non-profit elementary and secondary school classrooms and libraries.⁶ Pursuant to this same statutory authority, the Commission later made leased dark and lit fiber provided by telecommunications carriers and non-telecommunications providers eligible for E-rate program discounts as a Priority One service.⁷

3. The Commission has authorized E-rate funding to eligible schools and libraries for eligible services for the following categories of service: telecommunications services, telecommunications, Internet access, internal connections, and basic maintenance of internal connections (BMIC).⁸ Every year the Commission releases an ESL to provide applicants notice of any changes to the array of services and products eligible for E-rate funding prior to the applicants seeking bids for services and applying for E-rate support. Pursuant to Commission rules, the universal service administrator, currently the Universal Service Administrative Company (USAC), must submit a proposed ESL for the upcoming funding year by March 30 of each year, and the Wireline Competition Bureau (Bureau) is required to seek public comment on the proposed ESL.⁹ After the public has had an opportunity to comment, the final ESL for the upcoming funding year must be released at least 60 days prior to the opening of the E-rate application filing window.¹⁰ The Bureau sought comment on proposed changes for the ESL for funding year 2013 through release of the *ESL Public Notice* on July 5, 2012.¹¹ The comment cycle closed on August 21, 2012.¹²

4. In the *ESL Public Notice*, the Bureau proposed to reorganize the Priority One section of the ESL into three sections: “communications connectivity”, “voice services” and “other designated and related services.”¹³ The goal of the proposed reorganization was to group Priority One services by categories reflecting how school and library applicants plan for and seek technology and services, in order to make the ESL a more user-friendly tool for the E-rate community.¹⁴ The Bureau recognized that there could be other ways to organize the ESL to make it a more useful resource and to reduce regulatory burdens and sought alternative proposals.¹⁵ The Bureau also proposed to add a third column of check boxes in the Priority One section to indicate the category of service applicants should select in Block 2 of the FCC Form 470 and Block 5 of the FCC Form 471, in order to assist applicants in understanding the

⁶ *Id.*

⁷ *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, 18768 (2010) (*Sixth Report and Order*). The Commission concluded that although section 254(h)(1)(B) requires telecommunications carriers to provide universal service to schools and libraries, it does not “stand as a bar to [the Commission’s] authority to allow non-telecommunications providers to provide such services and participate in the E-rate program.” *Id.* Prior to the *Sixth Report and Order*, although lit fiber was eligible for funding as a telecommunications service or Internet access service, an applicant could not lease fiber for voice telecommunications from a non-telecommunications carrier. *Id.*

⁸ 47 C.F.R. § 54.502(a).

⁹ See 47 C.F.R. 54.502(b)(1).

¹⁰ *Id.*

¹¹ *Wireline Competition Bureau Seeks Comment on Draft Eligible Services List for Schools and Libraries Universal Service Program*, CC Docket No. 02-6 and GN Docket No. 09-51, Public Notice, 27 FCC Rcd 7405 (Wireline Comp. Bur. 2012) (*ESL Public Notice*).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

relationship between eligible services and the FCC Forms 470 and 471 used by applicants to seek services from vendors and support for those services from USAC.¹⁶

III. DISCUSSION

5. Having considered the record, we update the ESL for funding year 2013 to consolidate the current list of telecommunications services, telecommunications and Internet access into a single Priority One category. The State E-rate Coordinator Alliance (SECA) and others support this approach as a way to reduce regulatory burdens and simplify the E-rate application process.¹⁷ When applying for discounts, E-rate applicants are focused on the services they need for their schools and libraries, and may be unfamiliar with the regulatory framework for telecommunications services and Internet access established by Commission rulemakings.¹⁸ Moreover, many of the services purchased by schools and libraries using E-rate funding can fall into more than one of the regulatory classifications. While these regulatory distinctions remain, moving the several types of Priority One services into one list on the ESL reflects the marketplace understanding that specific telecommunications services and Internet services may be used interchangeably to meet communications needs.

6. We adopt several procedural changes to assist applicants and service providers with the transition to the revised ESL. First, because the ESL will no longer differentiate Priority One services based on whether they are telecommunications services, telecommunications or Internet services, we do not expect applicants to classify their service requests into those categories when soliciting bids for those services. We therefore direct USAC, in conducting program integrity assurance (PIA) reviews, not to treat an applicant's failure to correctly identify the type of Priority One service it is seeking on the FCC Form 470 as an automatic violation of the competitive bidding requirements.¹⁹ While a longer term solution, supported in the record, would be to change the FCC Form 470 to provide for one check box for Priority One services,²⁰ we understand that applicants have already started to use the FCC Form 470 for

¹⁶ *Id.*

¹⁷ SECA Comments at 2-3; The Quilt Comments at 2; Funds for Learning Comments at 3 (agreeing that the ESL should be consolidated into three categories: 1) telecommunications/Internet access (Priority One); 2) Internal connections (Priority Two); and 3) BMIC (Priority Two), in order to reduce denials and make the application process more efficient).

¹⁸ See The Quilt Comments at 2; Funds for Learning Comments at 3-5; SECA Comments. at 1 (noting, for example, that while distinction between two of the existing Priority One services, "Telecommunications Services" and "Telecommunications" highlights different regulatory treatments, it is not meaningful to most applicants); Kellogg & Sovereign (Kellogg & Sovereign) Consulting Comments at 2-4 (noting that the different rules for which type of service provider can provide a particular service adds another layer of complexity to the already-complex set of E-rate program rules; as an example, it asserts that many applicants erroneously think that they do not need to request Internet access when they are requesting cellular service with data packages and email access).

¹⁹ 47 C.F.R. § 54.503. See SECA Comments at 4 (proposing that treatment of the FCC Form 470 as if there were only one Priority One category can be accomplished by changing USAC program integrity assurance (PIA) procedures and issuing appropriate guidance to applicants and service providers). After an E-rate applicant files an FCC Form 471 and the associated Item 21 attachment(s) within the filing window, USAC's PIA reviewers check the form for completeness and accuracy pursuant to PIA procedures and may have questions related to eligible services, eligible entities, discount calculations, etc. See USAC website, Step 5 - Application Review, <http://www.usac.org/sl/applicants/step05/>, last visited Sept. 4, 2012. PIA procedures are approved by the Bureau. See, e.g., *Letter from Trent Harkrader, Wireline Competition Bureau, to Mel Blackwell, Universal Service Administrative Company*, DA 12-626, Letter, 27 FCC Rcd 4174 (Wireline Comp. Bur. 2012).

²⁰ See SECA Comments at 3-4 (suggesting there should be only one Priority One and one Priority Two category on the FCC Form 470 and FCC Form 471 to alleviate applicant confusion over which category to select on these forms when seeking support for convergent or mixed telecommunications and Internet access services); Funds for Learning Comments at 3-4 (agreeing with SECA that "moving from multiple Priority One service categories to one

(continued...)

funding year 2013 and changing the form prior to the close of the funding window for funding year 2013 may lead to applicant confusion. We agree that at this time, it is sufficient for applicants to check off one Priority One service category on the FCC Form 470 as long as the description of the services requested or the Request for Proposal associated with the request contains enough detail for service providers to identify the desired services and formulate bids.²¹

7. Moreover, we are persuaded by commenters who argue that it should not be burdensome for service providers to review one slightly longer list of Priority One services on the ESL and both Priority One sections on an applicant's FCC Form 470 when considering whether to respond to procurement requests.²² Changing PIA review and simplifying the ESL to include a single list of eligible services should not negatively impact the functioning of the competitive bidding process; service providers responding to either Requests for Proposals or FCC Forms 470 already have a natural economic incentive to determine how they can best serve the needs of schools and libraries with their service offerings. We recommend that service providers review the entire Priority One section of an applicant's FCC Form 470 when deciding whether they should respond with a bid, and we direct USAC to educate the E-rate community about this administrative change.

8. When requesting E-rate funding applicants must continue to select the correct category of service on the FCC Form 471. This requirement serves statutory and regulatory purposes. For example, applicants seeking Internet access must select Internet access as one of their categories of service on the FCC Form 471 because this is one of the checks that USAC uses to determine which applicants need to comply with Children's Internet Protection Act (CIPA) requirements.²³ Once an applicant has selected a vendor, it may consult with the vendor about which service category in Block 5 of the FCC Form 471 the applicant should use in describing the service the vendor will be providing.²⁴

9. We also adopt a few minor changes to the ESL for Funding Year 2013. First, as proposed in the *ESL Public Notice*, we remove citations to Commission orders and other legal and regulatory language from the ESL to make it more understandable to school and library personnel for whom those citations have no immediate significance. We conclude that removing such language will serve to

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reflects the convergence of telecommunications and Internet services in the marketplace," and that it would be simpler for service providers to review one list of procurement requests for Priority One services rather than reviewing two lists of services); Kellogg & Sovereign Comments at 3-4 (agreeing that applicants should only be required to check the Priority One designation on the FCC Form 470 so that they can navigate the application process without having the "sophisticated" knowledge of the regulatory requirements of telecommunications and Internet access providers).

²¹ See 47 C.F.R. § 54.503(c)(i), (ii) (stating that the FCC Form 470 and any request for proposal cited in the FCC Form 470 must include, at a minimum, the following information with respect to the services requested: (i) a list of specified services for which the applicant anticipates it is likely to seek discounts; and (ii) sufficient information to enable bidders to reasonably determine the needs of the applicant); see also *Request for Review of the Decisions of the Universal Service Administrator by Approach Learning and Assessment Center, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 23 FCC Rcd 15510 (2008). Although we do not intend to amend the FCC Form 470 for funding year 2013, we may make minor administrative changes to the instructions to the form to improve clarity.

²² See SECA Comments at 3-4; Funds for Learning Comments at 3-5. These commenters also indicate that one list of Priority One services on the ESL will eliminate applicant uncertainty over which service category to select on the FCC Form 470 and in so doing removes an unnecessary regulatory burden.

²³ See 47 C.F.R. § 54.520.

²⁴ We had proposed a third "category of service" column to the draft ESL to help applicants select the correct category of service but do not adopt this change because we conclude that this may be confusing for some applicants. See SECA Comments at 3 and Kellogg & Sovereign Comments at 2-3 (stating that the third-column of service category check boxes will be confusing to applicants).

streamline the ESL and make it a better reference focused on eligible services and products.²⁵ We also adopt our proposal to reposition the eligibility requirements for telecommunications services from the beginning of the ESL to the Special Eligibility Conditions section.²⁶ We recognize the importance of providing these definitions in the ESL, but believe it is sufficient to list this information in the Special Eligibility Conditions section of the ESL where other useful and important information is located.²⁷

10. In addition, we make a minor modification to the section describing supported telecommunications services in the ESL to state that all supported telecommunications services provided by telecommunications carriers include all *commercially available* telecommunications services.²⁸ As we clarified in the *ESL Public Notice*, the phrase “commercially available” that had been inadvertently omitted from the funding year 2012 ESL is included verbatim from the Commission’s rules and, as such, should be reinserted to avoid any confusion or suggestion that the ESL has changed the requirement that eligible telecommunications services include all commercially available telecommunications services.²⁹ Finally, we also remove the sentence in the ESL stating that point-to-point connectivity of data, video, or voice applications, is ineligible as a telecommunications service, except if provided by fiber or dark fiber. In the wake of the *Sixth Report and Order*, where the Commission determined that non-telecommunications carriers could provide dark fiber,³⁰ we added the language “except if provided by fiber or dark fiber” to acknowledge the Commission’s decision to fund fiber. On further reflection, we conclude that even with this edit, this sentence remains confusing to applicants. Instead, applicants that seek lit or dark fiber solutions should review the information in the entry for fiber in the ESL.

11. Finally, several commenters raise E-rate eligibility issues that were not proposed in the *ESL Public Notice*. While a few of these commenters seek clarification on the issues surrounding the bundling of ineligible equipment with eligible services,³¹ we defer acting on these issues for now because they were

²⁵ AT&T Comments at 2 (agreeing that elimination of the majority of citations to Commission orders and other legal and regulatory language will help improve the readability of the ESL). Although we disagree that the ESL should be used as a primary source for E-rate requirements, Kellogg & Sovereign suggested that removal of the legal and regulatory language would render E-rate applicants less informed and make the ESL less transparent. Kellogg & Sovereign Comments at 3. Kellogg & Sovereign also claims that we should continue to include program rules in the ESL so that service providers offering new technologies will be to determine if the new technology is based on an understanding of the E-rate rules in the event the new technology is not specifically named in the ESL. Kellogg & Sovereign Comments at 3. While there may be occasion where a new technology seems to clearly fit within a service category, new technologies and services generally need to be affirmatively added to the ESL as an eligible service. See 47 C.F.R. § 54.502(b)(2) (“All supported services are listed in the Eligible Services List as updated annually....”).

²⁶ *ESL Public Notice*, 27 FCC Rcd at 7408, 7436 (draft Eligible Service List, Schools and Libraries Universal Service Support Mechanism, rel. July 5, 2012).

²⁷ But see AT&T Comments at 2-3 (requesting that the language explaining that telecommunications services must be provided by a telecommunications carrier be moved back to the beginning of the ESL).

²⁸ See *ESL Public Notice*, 27 FCC Rcd 7406.

²⁹ 47 C.F.R. § 54.502(a)(1). See also *Universal Service First Report and Order*, 12 FCC Rcd at 9008, para. 434 (limiting section 254(c)(3) telecommunications services to those that are commercially available, and finding no reason to interpret section 254(c)(3) as requiring the Commission to adopt a more narrow definition of eligible services). See Jason Lawrence Comments (seeking clarification of whether commercially available telecommunications services are eligible).

³⁰ *Sixth Report and Order*, 25 FCC Rcd at 18765-73.

³¹ See, e.g., E-Rate Provider Servicers Comments at 4; Jive Communications Comments; NetDiverse Comments.

raised in a Bureau public notice (DA 12-1325) released subsequent to the *ESL Public Notice*.³² We will consider any comments filed in response to the *ESL Public Notice* that reference the bundled equipment issues at a later date. Several other commenters request that we add services to the ESL and clarify other outstanding issues related to eligibility. Due to the complexity of some of these issues, we are not able to consider these requests at this time.³³

IV. ORDERING CLAUSES

12. ACCORDINGLY, IT IS ORDERED, that pursuant to the authority contained in sections 1 through 4, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 254, 303(r), and 403, and pursuant to authority delegated in sections 0.91 and 54.502 of the Commission's rules, 47 C.F.R. §§ 0.91 and 54.502, this order IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Julie A. Veach
Chief
Wireline Competition Bureau

³² See *Wireline Competition Bureau Seeks Comment on a Petition Filed by the State E-Rate Coordinators' Alliance Seeking Clarification Regarding the Eligibility of Bundled End User Equipment Under the Schools and Libraries Program*, Public Notice, CC Docket No. 02-6, DA 12-1325 (Wireline Comp. Bur. rel. Aug. 10, 2012).

³³ See, e.g., E-Rate Provider Servicers Comments at 2-3 (urging the Commission to make cellular data plans ineligible because they are not cost-effective); Funds for Learning Comments at 9-11 (requesting that the Commission open a Notice of Inquiry about BMIC); The Quilt Comments at 2 (requesting the ESL to make clear that E-rate applicants may purchase "telecommunications" from non-carriers such as research and education networks and for the Commission to open a proceeding to equalize treatment of fiber-based "telecommunications services" and "telecommunications," specifically with regard to special construction charges and modulating electronics); Kellogg & Sovereign Comments at 6-7 (seeking clarification on educational purposes and off-campus use regarding wireless Internet access service for portable electronic devices and clarification related to issues surrounding eligible users and locations); Montgomery County Public Schools Reply Comments at 5 (asking the Commission to consider eligibility for broadcast "blast" messaging, emergency notification services, and conferencing services); Funds for Learning Comments at 6-8 (seeking the addition of uninterruptible Internet service as an eligible service and requesting eligibility for all telecommunications surcharges and fees); Edline Comments (seeking confirmation and clarification that data input and retrieval associated with applicant-created forms and templates is an eligible part of web hosting).

APPENDIX A

List of Commenters**Comments and Reply Comments in Response to the *ESL Public Notice*
for the Funding Year 2013 ESL****CC Docket No. 02-6; GN Docket No. 09-51****Commenters**

1. AT&T Services, Inc.
2. Edline, LLC
3. E-Rate Provider Services, LLC
4. Funds for Learning, LLC
5. Jason Lawrence
6. Jive Communications, Inc.
7. Kellogg & Sovereign Consulting, LLC
8. NetDiverse, LLC
9. State E-rate Coordinators' Alliance

Reply Commenters

1. AT&T Services, Inc.
2. Montgomery County Public Schools
3. Sprint Nextel Corporation
4. The Quilt

APPENDIX B

Eligible Services List for Funding Year 2013

(view as .pdf document released with this Report and Order)