

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Mechanism)	

OPPOSITION OF UNITED STATES TELECOM ASSOCIATION

SUMMARY OF OPPOSITION

United States Telecom Association (“USTelecom”) respectfully opposes the revisions to FCC Forms 472, 473 and 474 proposed by the Wireline Competition Bureau in a March 8, 2013 Public Notice issued pursuant to the Paperwork Reduction Act. The proposed revisions substantially amend the scope of the certifications that a service provider must make as a condition of participating in the E-rate program. These new certifications are procedurally infirm, arbitrary and capricious, and administratively burdensome. The proposed revisions would fundamentally alter the E-rate program by, among other things, forcing service providers to become enforcement agents of the Commission by policing their school and library customers and placing practically impossible and highly onerous certification burdens on service providers. These expanded administrative burdens could discourage participation in the E-rate program and potentially lead to higher prices, all to the detriment of the E-rate program and the schools and libraries that benefit from it.

USTelecom’s members take their compliance obligations very seriously. It is precisely because of this commitment that we must respectfully object to the Bureau’s attempt to implement important changes to the E-rate program’s regulatory scheme without adequate vetting. For these reasons, and as further explained below, the Wireline Competition Bureau should not adopt the proposed revisions to Forms 472, 473 and 474.

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More specifically, the Bureau's proposed revisions of the forms would violate the Administrative Procedure Act ("APA"). By imposing new and substantial requirements on service providers pursuant to a PRA notice, the proposed revisions improperly adopt and amend existing FCC rules without a proper notice-and-comment proceeding under the APA and exceed the scope of the Bureau's authority. Furthermore, adoption of the proposed revisions would be arbitrary and capricious because several of them are overbroad and vague, and others require service providers to certify to the compliance of entities over which they have no control. In addition, as a policy matter, the Bureau should not adopt the proposed revisions to Forms 472, 473 and 474. The revisions involve onerous certification requirements that could discourage service providers' participation in the E-rate program, to the ultimate detriment of the program and the public interest.

I. THE PROPOSED REVISIONS WOULD VIOLATE THE ADMINISTRATIVE PROCEDURE ACT.

A. The Bureau Cannot Adopt the Proposed Revisions Without First Undergoing Notice and Comment Under the APA.

The Bureau's chosen method of revising the rules is procedurally infirm. Here, the Bureau declares its intent to make the proposed revisions pursuant to the PRA,³ but the PRA is not the proper procedural vehicle to undertake the kind of revisions proposed here. As discussed below, the changes to Forms 472, 473 and 474 substantially amend E-rate service providers' existing substantive obligations under the E-rate program and impose new and onerous certification requirements on service providers.⁴ Accordingly, the revisions effectively expand

³ *Public Notice* at 1.

⁴ *See* Section I.B.

the application of existing rules and adopt new ones. Such rule changes are the proper subject of notice-and-comment rulemaking under the APA, not the PRA.⁵ The difference is significant.

Under the APA, federal agencies must publish “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”⁶ The APA further requires that “[a]fter notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”⁷ To adopt or amend a rule, an agency must “first publish notice of the proposed rulemaking in the Federal Register, . . . a reference to ‘the legal authority under which the rule is proposed,’ and ‘either the terms or substance of the proposed rule or a description of the subjects and issues involved.’”⁸

Indeed, these requirements are not unknown to the Bureau. The last time it sought to change Forms 472, 473 and 474, it employed rulemaking procedures under the APA.⁹ Yet here, the Bureau proposes to amend these forms under the PRA, not the APA. The Public Notice

⁵ See *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 630 (5th Cir. 2001) (“Interior’s new practice may be a reasonable change in its oversight practices and procedures, *but it places a new and substantial requirement on many OCS lessees, was a significant departure from long established and consistent past practice, and should have been submitted for notice and comment* before adoption.) (emphasis added).

⁶ 5 U.S.C. § 553(b)(3).

⁷ *Council Tree Communications, Inc. v. F.C.C.*, 619 F.3d 235, 249 (3rd Cir. 2010) (citing 5 U.S.C. § 553(c)).

⁸ *Select Specialty Hosp.-Akron, LLC v. Sebelius*, 820 F. Supp. 2d 13, 22 (D.D.C. 2011) (citing 5 U.S.C. §§ 551(5), 553(b)(1)-(3)).

⁹ See *In the Matter of Schools and Libraries Universal Service Support Mechanism et al.*, CC Docket No. 02-6 et al., Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 20 FCC Rcd 11308, para. 41 (2005) (“2005 NPRM”) (seeking comment in rulemaking proceeding on the certification requirements in the E-rate forms, including whether a signature requirement should be added to Form 474 and how the Bureau could ensure that certifications executed in Form 472 are done independently).

does not explain why the Bureau departs from its past practice regarding changes to these forms and now proceeds pursuant to the PRA.

The Bureau cannot skirt its obligations under the APA by promulgating these revisions under the PRA, particularly where, as here, it seeks to force new requirements on service providers and expand existing requirements, both substantive and procedural, in new and expensive ways.¹⁰ For example, the Bureau proposes to require service providers to certify their compliance with state and local competitive bidding requirements, although the current rule on competitive bidding by its terms clearly applies only to applicant schools and libraries.¹¹ The Bureau cannot impose a competitive bidding certification requirement on service providers without first undergoing notice and comment, especially given that the Commission previously addressed the adequacy of E-rate forms with respect to the competitive bidding rules in a rulemaking.¹² The Bureau must explain its rationale for proposing such a rule change, and the Public Notice fails to provide any rationale whatsoever to justify the imposition of this obligation on service providers. And the competitive bidding certification is just one example among many proposed revisions to Forms 472, 473 and 474 that would impose new obligations on service providers by effectively adopting new rules or expanding the scope of the current rules.¹³

¹⁰ “[N]ew rules that work substantive changes in prior regulations are subject to the APA’s procedures.” *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003); *see also Minard Run Oil Co. v. U.S. Forest Service*, 670 F.3d 236, 255 (3rd Cir. 2011) (finding settlement agreement and new agency policy created new duties and have a “substantive adverse impact on the challenging party,” and therefore required notice and comment under the APA).

¹¹ *Compare* Draft Form 473, Item 21 *with* 47 C.F.R. § 54.503(b) (“an eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support”).

¹² *See 2005 NPRM*, ¶ 41 (“We seek comment on whether the Form 470 facilitates the competitive bidding process, and whether our rules should continue to require this form and its public disclosure.”).

¹³ *See supra* Section I.B.

Moreover, even if the Bureau were proceeding under the APA rather than the PRA, there would still be another problem. In delegating authority to the Bureau, the Commission expressly prohibited the Bureau from engaging in rulemakings.¹⁴ The Bureau cannot avoid this prohibition by purporting to adopt or amend the certifications at issue under the PRA. Because the Bureau's proposed revisions effectively adopt new rules and amend the scope of existing rules, and because only the full Commission can conduct rulemaking proceedings, the revisions can only be procedurally achieved in a rulemaking by the Commission under the APA.

B. The Bureau's Proposed Revisions Are Arbitrary and Capricious.

The Bureau's proposed revisions to Forms 472, 473, and 474 impose burdensome certification requirements that greatly exceed the scope of what is required under existing FCC rules and fail to give E-rate service providers notice as to the scope of their duties. As a result, service providers will be unable to complete the required certifications, thereby introducing great uncertainty into the current E-rate funding stream. The Bureau's proposed revisions are arbitrary, capricious and ultimately unsustainable.

Form 473. The Bureau's proposed revisions to Form 473 are the most extensive of the proposed form changes. The proposed revisions to Form 473 exceed the current certification requirements set forth in Section 54.504(f) of the FCC's rules¹⁵—as well as the underlying substantive rules—in a number of ways. Furthermore, the proposed certifications that require service providers to attest to the applicant's compliance make little sense in light of E-rate's

¹⁴ The Commission's rules explicitly prohibit the Chief of the Wireline Competition Bureau from engaging in a rulemaking. *See* 47 C.F.R. § 0.291(e) ("The Chief, Wireline Competition Bureau, shall not have authority to issue notices of proposed rulemaking, notices of inquiry, or reports or orders arising from either of the foregoing . . .").

¹⁵ *See* 47 C.F.R. § 54.504(f).

administrative scheme, are inherently unfair, and are impossible to satisfy in any event.

Specifically:

- The current certification rules require only that “an authorized person” provide the certification. However, in contrast to this rule, the proposed revision to Form 473, Item 9 would mandate an officer’s certification.¹⁶
- The proposed revision to Form 473, Item 11 would impose a new obligation on service providers to certify proper allocation of costs pursuant to Section 54.504(e) of the Commission’s rules. But this obligation does not appear in the current formulation of Section 54.504(f)¹⁷ and thus effectively adds a new certification requirement for service providers to the FCC’s rules.
- The proposed revision to Form 473, Item 13 would require service providers to certify to the accuracy of an E-rate *applicant’s* Form 471.¹⁸
 - The current E-rate administrative scheme makes it practically impossible for a service provider to attest to an applicant’s Form 471 compliance. First, specific details of the form (Item 21 of Form 471) are only available for the service provider’s review after the applicant submits the form and only when the applicant uses electronic filing. If an applicant manually files Item 21 of Form 471, the service provider will have no means of reviewing it. And even where a service provider has access to an applicant’s Form 471 information, the service provider still could not certify that the applicant actually ended up ordering all services correctly after the funding letter is granted and the orders are submitted.¹⁹
 - The certification contained in draft Form 473 Item 13 would effectively convert service providers into enforcement agents of the FCC, requiring them to audit schools and enforce compliance programs for E-rate

¹⁶ Compare 47 C.F.R. § 54.504(f) (“The FCC Form 473 shall be signed by an authorized person . . .”) with Draft Form 473, Item 9.

¹⁷ See Draft Form 473, Item 11 (“I certify that any requests for reimbursement . . . are properly allocated as required by the Commission’s rules at 47 C.F.R. § 54.504(e)(1) and (2).”).

¹⁸ See Draft Form 473, Item 13 (“I certify that the pre-discount costs of eligible services sought by any applicant on an FCC Form 471 are net of any rebates or discounts offered by this service provider.”)

¹⁹ Major E-rate service providers have recommended streamlining the E-rate program to improve its administration and efficiency by reducing their current middle-man role between schools and the program administrator. See Letter from Mary L. Henze, AT&T, to Marlene Dortch, Federal Communications Commission, WC Docket No. 05-195, CC Docket No. 02-6 (Sept. 14, 2007) (ex parte notice of September 13, 2007 meeting with representatives from AT&T, Verizon, Embarq, Sprint and Qwest).

applicants. But service providers have no authority to require such compliance from E-rate applicants and should not be conscripted to perform a regulatory duty that ultimately belongs to the FCC.²⁰

- Requiring the service provider to attest, under penalty of perjury, to the applicant's compliance with E-rate regulation is an excessive and virtually impossible obligation to meet. As a result, this proposed revision would have catastrophic consequences to the E-rate program because service providers will not be able to make the certification, which would, in turn, lead to a break-down of the funding process.
- Another proposed revision to Form 473, Item 13 would require service providers to certify that any free services “constitute a rebate of the non-discount portion of the supported services.”²¹ This imposes another new duty on service providers not contained in the current certification or substantive rules.
- The proposed revisions to Items 14 and 15 require service providers to certify that no kickbacks were paid and the service provider complied with *and will continue to comply with* the Commission's rules regarding gifts.²² But the current certification rules include no such requirement. They do include a requirement that service providers arrive at their prices “independently,”²³ but without further explanation from the Bureau this is unclear. Furthermore, Item 15 requires certification that the service provider “will continue to comply” with the Commission's gift rules. Requiring certifications, declared to be true under penalty of perjury, for facts that have not yet occurred is nonsensical.
- The proposed revision to Form 473's record-keeping requirement in Item 16 would require service providers to “make all documents requested available” and notes that service providers “must provide such records” to the Fund Administrator.²⁴ This change is not embodied in the current Form 473 certification obligation under Section 54.504(f), and there is no practical justification to amend the certification obligation to include it because Section 54.516(b) speaks for itself.

²⁰ The FCC has previously exercised its authority to police applicants' compliance with the E-rate rules. *See, e.g., In the Matter of Comprehensive Review of the Universal Service Fund Management, Administration and Oversight, et al.*, WC Docket No. 05-195, et al., Report and Order, 22 FCC Rcd 16372, 16386-88 ¶¶ 31-33 (2007) (noting “several well-publicized cases of fraud against the schools and libraries program” and discussing the adoption of debarment rules).

²¹ *See* Draft Form 473, Item 13.

²² *See* Draft Form 473, Items 14 and 15.

²³ *See* 47 C.F.R. § 54.504(f)(1).

²⁴ *See* Draft Form 473, Item 16.

- Draft Form 473, Item 20 adds a certification for service providers to represent that they have “taken reasonable steps to implement the lowest corresponding price rule.”²⁵ The Public Notice, however, does not define what the Bureau views as “reasonable steps”—nor does any regulation or order provide such guidance—and thus fails to give service providers notice as to the scope of their obligation under this certification requirement.²⁶
- Draft Form 473, Item 21 adds a new certification representing that service providers are in compliance with “state and local bidding requirements” under Section 54.503(b) of the Rules, but those requirements apply to applicant schools and libraries, *not* service providers. The Bureau has not explained how service providers are supposed to meet – or certify compliance with – a requirement that does not currently apply to them and over which they have no control.²⁷
- Draft Form 473, Item 23 adds an ambiguous certification requirement for a service provider to represent that it is “in compliance with the other rules and orders governing” the E-rate program.²⁸ This certification is so broad as to fail to provide service providers with adequate notice of the scope of their compliance obligations, and could conceivably require them to certify as to the compliance of applicant schools and libraries.
- As in item 15, Item 23 in draft Form 473 would also have service providers certify as to future compliance with the rules and orders governing the E-rate program. This proposed requirement is likewise overbroad, vague and impossible to implement.²⁹

Form 472. Draft Form 472 suffers from the same infirmity as Draft Form 473, Item 23:

it imposes a vague and overbroad compliance requirement with “the other rules and orders

²⁵ Draft Form 473, Item 20.

²⁶ See also *Petition of United States Telecom Association and CTIA–The Wireless Association® for Declaratory Ruling Clarifying Certain Aspects of the “Lowest Corresponding Price” Obligation of the Schools and Libraries Universal Service Program*, CC Docket No. 02-6 (filed Mar. 19, 2010) (seeking clarification regarding operation of certain aspects of the lowest corresponding price rule).

²⁷ Compare Draft Form 473, Item 21 with 47 C.F.R. § 54.503(b) (“an eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support”).

²⁸ Draft Form 473, Item 23.

²⁹ Draft Form 473, Item 23 (“this Service Provider will be in compliance with all rules and orders”).

governing the schools and libraries universal service support program.”³⁰ Furthermore, given that Form 472’s purpose is to facilitate reimbursement to the applicant by the E-rate program, it makes little sense to require service providers to certify to any of the substantive invoicing information submitted by applicants when service providers do not have a vested interest in the applicants’ reimbursement.

Form 474. Draft Form 474 adds a service provider certification to the Form which did not exist previously, and also suffers from the vague and overbroad compliance requirement present in draft Forms 472 and 473.³¹

The practical consequence of the above-described changes to Forms 473, 472, and 474 is that service providers simply will not be able to attest to the new certifications. Service providers have hundreds, sometimes thousands, of school and library customers and cannot be expected to monitor the compliance of E-rate applicants with the Commission’s governing rules. If the Bureau adopts these onerous revisions, service providers’ inability to complete these certifications will introduce considerable uncertainty into the E-rate funding stream.

In sum, as a function of the failure to adhere to proper procedures for the adoption of these proposed certification revisions, the Bureau, even if it had delegated authority here, has neither explained its rationale for the adoption of new obligations nor the amendment of existing ones. Furthermore, several of the Bureau’s proposed revisions to Form 473 make little sense in light of the Commission’s existing rules and are so overbroad and vague that service providers will not be able to certify compliance. Instead of improving the administration of the E-rate program, the proposed revisions threaten to derail the program’s entire funding stream.

³⁰ See Draft Form 472, Block 4, Item C.

³¹ See Draft Form 474, Block 3, Item A.

Accordingly, the Bureau's proposed revisions of these forms are arbitrary and capricious, cannot be sustained, and must be rethought.

II. THE BUREAU SHOULD NOT IMPOSE ONEROUS CERTIFICATION REQUIREMENTS ON E-RATE SERVICE PROVIDERS.

As a matter of policy, the Bureau should not revise Forms 472, 473 and 474 to include the above-described certification requirements. These onerous certification requirements will massively increase service providers' administrative burden and potentially expose them to, for example, expanded liability under the False Claims Act. By so raising the administrative costs and risks of participation, the proposed certification requirements could discourage participation in the E-rate program and potentially lead to higher prices, all to the ultimate detriment of the program and the public interest.

A. The Proposed Revisions Could Substantially Increase the Administrative Burden of Participating in the E-rate program.

The FCC estimates that draft Forms 472, 473 and 474 will each take one hour to complete,³² but this estimate is orders of magnitude off the mark in light of the increased certification requirements that the Bureau would impose on service providers. If service providers are required to review applicant forms to satisfy the proposed certifications in the draft forms, the time required to coordinate and to conduct review will certainly exceed an hour by multiple levels. Furthermore, if service providers are forced to monitor the compliance of schools and libraries with all applicable E-rate rules and orders (which is practically impossible in any event), this ongoing obligation will explode service providers' administrative burden of participation.

³² See, e.g., Draft Form 473 ("Estimated time per response: 1.0 hour").

B. The Onerous Certification Requirements Could Discourage Participation in the E-rate Program and Potentially Lead to Higher Prices.

The draft forms all require service providers to make declarations under penalty of perjury and provide certifications,³³ with an express acknowledgment of potential liability under the False Claims Act. This is particularly troubling where the proposed certifications appear to require service providers to certify as to the compliance of applicant schools and libraries over whom service providers have no control. Faced with an inability to mitigate their exposure to this risk, service providers may reconsider their participation in the E-rate program.

And because the proposed certifications increase the administrative burden of participation, E-rate participation will become more costly to service providers. Not only could service providers be forced to spend time monitoring the compliance of applicant schools and libraries, they could also be forced to modify their current compliance systems so as satisfy the draft forms' new certifications. Such modifications could extend to the re-organization of staff duties to costly upgrades of record-keeping and internal monitoring systems. Moreover, the additional requirement of officer certification will increase the amount of resources and time necessary to conduct a review of the forms and relevant supporting documentation, further increasing participations costs.

Decreased participation in the program, coupled with increased costs of compliance for those service providers who remain in the program, could raise the costs of providing service across the board. Ultimately, higher prices do not serve the schools and libraries that depend on the E-rate program to provide service to students and the public.

³³ For example, Draft Form 473 adds "I certify that" to a number of existing obligations on the current form and all new requirements are phrased as a certification. Furthermore, as mentioned above, Draft Form 474 adds a service provider certification where one did not previously exist before.

III. CONCLUSION

USTelecom's members take their compliance obligations very seriously. It is precisely because of this commitment that we must respectfully object to the Bureau's attempt to implement substantive changes to the E-rate program's regulatory scheme without thorough vetting. For the foregoing reasons, the Bureau should not adopt the proposed revisions to Forms 472, 473 and 474.

Respectfully submitted,

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