

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

To: The Wireline Competition Bureau

REPLY COMMENTS OF T-MOBILE USA, INC.

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T-Mobile USA, Inc., submits these reply comments in response to the Wireline Competition Bureau’s (“Bureau”) Public Notice seeking comment on eliminating the “bundling rule” adopted in the *Gift Rule Clarification Order* that allows schools and libraries to take advantage of wireless carriers’ standard practice of providing free or reduced-price wireless handsets with certain wireless service packages.¹

I. INTRODUCTION AND SUMMARY

T-Mobile urges the Commission to retain the bundling rule, at least as to free or reduced-price equipment offers that are broadly made available to the public and enterprise customers. There is no evidence in the record that application of the bundling rule is creating any strain on the fund, and it will not be as difficult to police the rule going forward as the Public Notice supposes. The Public Notice also fails to account for the significant burdens that would result from requiring full cost allocation, or the impact on schools’ and libraries’ ability to benefit from

¹ *Wireline Competition Bureau Seeks Comment on the Eligibility of Bundled Components Under the Schools and Libraries Program*, CC Docket No. 02-6, GN Docket No. 09-51, Public Notice, DA 13-592 (rel. April 9, 2013) (“Public Notice”).

the pricing plans that make available the most current wireless voice and broadband devices. Given the White House directive to increase school broadband speeds and deployment, the Commission can ill afford to eliminate schools' and libraries' ability to take advantage of deals that are available to the public. At minimum, if the Commission requires cost allocation, it must take steps to minimize the burden and allow a reasonable transition.

II. THERE IS NO EVIDENCE THAT THE *GIFT RULE CLARIFICATION ORDER* IS LEADING TO UNINTENDED CONSEQUENCES THAT WILL STRAIN THE FUND

As Sprint points out in its initial comments, there is no evidence that the bundling rule is increasing the prices of reimbursable services and placing a strain on the fund.² The Public Notice proposes to eliminate the bundling rule based on a “*concern* that an open-ended interpretation and widespread use and expansion of this exception *could* lead to further strain on the E-rate fund, which is capped and already oversubscribed.”³

Neither the Public Notice nor the record in this proceeding presents evidence, however, that the bundling rule has in fact increased reimbursements from the fund or placed the fund under any strain. Commenters have presented vague, anecdotal accounts of instances in which, for example, interconnected voice over Internet protocol (“VoIP”) providers are offering free VoIP phones along with supported VoIP service.⁴ The State E-rate Coordinators’ Alliance (“SECA”) presents a single example in which an interconnected VoIP provider offered a school district a VoIP package with bundled handsets that would have increased the price of the service

² Comments of Sprint Nextel Corporation, WC Docket No. 02-6 (filed May 23, 2013) at 2-3 (“Sprint 2013 Comments”).

³ Public Notice at ¶ 7.

⁴ *See, e.g.*, Comments of Jive Communications, Inc., WC Docket No. 02-6 (filed Sept. 10, 2012); Comments of NetDiverse, LLC, WC Docket No. 02-6 (filed Sept. 10, 2012).

by about \$43,000 per year, but this example itself would be eliminated by SECA's own proposed clarification, and should be addressed by the Commission's existing rules.⁵

The bundling rule has numerous benefits, as described in these comments;⁶ it would be clear error for the Bureau to eliminate it based solely on "concerns" and anecdotes with no concrete factual foundation.

III. REVERSING THE *GIFT RULE CLARIFICATION ORDER* MAY DENY E-RATE CUSTOMERS THE LOWEST RATES AND THE MOST CURRENT TECHNOLOGY

The Commission has stated that it is "committed to keeping the E-rate program in sync with modern needs and technological capabilities."⁷ As Commissioner Rosenworcel recently pointed out, students' access to the most current technology is "a matter of our global competitiveness.... Knowledge, jobs, and capital are going to migrate to places where workers have digital age skills."⁸ As noted, consistent with this commitment, the White House has just announced a multibillion dollar effort to increase broadband speeds in schools.⁹

In the wireless marketplace, the most current mobile devices generally have proportionally high stand-alone prices compared to their subsidized price when bundled with a long-term service contract plan. In some cases, these pricing models are driven by manufacturer

⁵ See *infra* Section IV.A.

⁶ See *infra* Sections III., IV.A.

⁷ *Schools and Libraries Universal Service Support Mechanism, et al.*, CC Docket No. 02-6 *et al.*, Sixth Report and Order, 25 FCC Rcd 18762, 18763 ¶ 3 (2010).

⁸ Remarks of Commissioner Jessica Rosenworcel, Washington Education Technology Policy Summit, Washington, DC (April 11, 2013), available at <http://www.fcc.gov/document/washington-education-technology-policy-summit>.

⁹ See, e.g., "White House Pushes for Expanding Internet Access in Schools," *The Hill* (June 6, 2013), available at <http://thehill.com/blogs/hillicon-valley/technology/303789-obama-calls-for-multibillion-dollar-expansion-of-school-internet-access>.

incentives and in other cases by carriers' own marketing efforts. There is no question, however, that this pricing model is an established part of the wireless marketplace. E-rate applicants are unlikely in many cases to be able to afford the stand-alone prices of the most current devices. As a result, by requiring full cost-allocation, the Bureau would deny schools and libraries the ability to take advantage of these offers, and effectively preclude them from purchasing the most current technology. This will prevent American students from learning with a cutting-edge tools, contrary to the Commission's E-rate goals.

The ability of schools to be able to take advantage of offers of free or reduced-price equipment that are available to the public and enterprise customers will be all the more important as the Commission seeks to implement the White House directive to increase schools' broadband speed and capacity. The fastest wireless broadband networks are 4G networks such as LTE and HSPA+ networks, which generally can be accessed only with the newest devices. Also, the increased pressure to spend E-rate funds on high-speed and high-capacity broadband networks will make it all the more important that schools can take advantage of other ways of saving money, such as free or reduced-price devices. Requiring full cost allocation will eliminate this opportunity, to the detriment of schools and libraries and the students and families that they serve.

IV. THE BURDENS OF REQUIRING COST ALLOCATION ARE LIKELY TO EXCEED THE BURDENS OF ADMINISTERING THE *GIFT RULE CLARIFICATION ORDER*

The Public Notice suggests that one reason for eliminating the bundling rule is the prospect of the administrative difficulty of analyzing "individual service provider offerings on a case-by-case basis."¹⁰ In fact, T-Mobile respectfully submits that the Public Notice overstates

¹⁰ Public Notice at ¶ 8.

the difficulty of administering the bundling rule – particularly if the rule is instead clarified in a few simple ways already proposed in the record. In addition, the Public Notice takes no account of the significant burdens and negative impacts that would result from requiring full cost allocation – which would far exceed the burdens of administering the bundling rule.

A. The Bundling Rule Will Not Be Difficult to Administer, Particularly With Minor Clarifications

The Public Notice envisions a worst-case scenario in which the Universal Service Administrative Company (“USAC”) and the Commission must administer the “open-ended interpretation and widespread use and expansion of this exception” to the regular cost-allocation and gift rules.¹¹ There is no reason, however, for the Commission to allow such a scenario to emerge. The Commission adopted the bundling rule primarily to account for the well-documented practice that wireless carriers often provide free or reduced-price handsets along with wireless service.¹² The bundling rule is a common-sense solution for a real-world problem – how to allow schools and libraries to benefit from an offering that is common in the marketplace and avoid penalizing E-rate applicants as compared to other customers.

T-Mobile agrees that the rule should be administered in a technology-neutral manner, but this does not mean that the rule should apply to unique or questionable scenarios. To make this clear, the Bureau should adopt SECA’s proposed clarification – supported by several commenters – that to qualify for the rule a bundling offer must be broadly available, as demonstrated for example by an offer that is available to all enterprise customers, and/or an offer

¹¹ *Id.*

¹² *Schools and Libraries Universal Service Support Mechanism, et al.*, CC Docket No. 02-6 *et al.*, Order, 25 FCC Rcd 17324, 17328 ¶ 11 & n.25 (WCB 2010) (“*Gift Rule Clarification Order*”).

that is available from more than a single provider.¹³ Bundles designed solely and specifically to exploit the E-rate bundling rule should not be permitted.¹⁴ As Sprint points out, where bundled offers truly are generally available, either the E-rate applicant or the service provider should have no problem producing marketing or sales materials to document them.¹⁵ This should minimize the burden on USAC in reviewing funding requests.

The Commission's other principal fear – that “the real cost to the provider of the ‘free’ or reduced price ineligible component results in a more expensive bundle,” increasing the burden on the fund¹⁶ – can also be easily addressed with a minor clarification. As SECA has proposed, service providers should not be permitted to offer a package or packages of equivalent eligible services without the bundled ineligible equipment at a lower price.¹⁷ Even without this clarification, however, the Commission's existing rules should prevent the cost of bundled equipment from inflating the cost of eligible services. Section 54.511(a) requires E-rate applicants to select their service providers based primarily on the lowest price for the *supported* services.¹⁸ If a service provider is bidding an inflated price to cover the costs of the bundled

¹³ See Reply Comments of SECA, WC Docket No. 02-6 (filed Sept. 24, 2012) at 5-6 (“SECA Reply Comments”).

¹⁴ *Id.* at 5.

¹⁵ Sprint 2013 Comments at 3.

¹⁶ Public Notice at ¶ 7.

¹⁷ SECA Petition for Clarification Pertaining to the Eligibility of Free VoIP Handsets and Other End-User Equipment, CC Docket No. 02-6 (filed July 27, 2012) at 3. See also Sprint 2013 Comments at 2-3.

¹⁸ 47 C.F.R. § 54.511(a). See also, e.g., *La Joya Independent School District*, CC Docket No. 02-6, Order, DA 13-1173 at ¶ 2 (WCB rel. May 29, 2013) (“*La Joya*”) (“The Commission’s rules require applicants to carefully consider all submitted bids prior to entering into a contract, and that the price of eligible products and services must be the primary factor in selecting the winning bid.”)

equipment, it risks being outbid by another service provider that proposes an unbundled bid – and the school would be required to select the lower, unbundled bid.¹⁹

B. Cost Allocation Will Impose Significant Burdens on the Fund, E-Rate Applicants, Service Providers, USAC, and the Commission

For all of its expressed fear of possible consequences of maintaining the bundling rule, the Public Notice fails to acknowledge the significant and clear negative unintended consequences that would flow from requiring cost allocation. Indeed, the negative consequences of cost allocation far outweigh the speculative potential complications of retaining the bundling rule.

First, and perhaps most significantly, requiring cost allocation for free or reduced price wireless handsets will preclude schools and libraries from receiving the benefit of these offers that are available to the public and enterprise customers. As the Commission acknowledges, in the absence of the bundling rule, E-rate applicants will be required to provide cost-allocation data for wireless devices that non-E-rate customers receive at no charge. Depending on the plan that the customer selects and the carrier's particular pricing plans, the cost allocation may be entirely artificial. To avoid such problems, E-rate applicants may simply opt for plans that do not include unbundled equipment. Whether the E-rate applicant opts to try to provide cost-allocation information or simply avoids the bundled plans, educational customers will be excluded from competitive offers on the most current equipment – prices that are available to other customers. This disserves the Commission's E-rate goals.²⁰

¹⁹ *See, e.g., id.* (finding that a school had violated the Commission's rules by considering the prices of *both* eligible *and* ineligible components in selecting a vendor, but granting a waiver because the same vendor was the low bidder considering only the price of eligible services).

²⁰ *See supra* Section III.

A cost allocation requirement also will create difficult problems under the Lowest Corresponding Price (“LCP”) rule for service providers that offer free or reduced-price equipment in bundles.²¹ Under the LCP rule, service providers may not charge E-rate customers more than the “lowest price that a service provider charges to non-residential customers who are similarly situated to a particular school, library, or library consortium for similar services.”²² Although the LCP rule is framed in terms of “supported services,”²³ the definition of the “lowest corresponding price” itself is framed in terms of “similar services” – apparently without regard to whether they are supported.²⁴ It is therefore unclear whether a service provider could make bundled discounts available to non-E-rate customers without making them available to E-rate customers as well.²⁵

In the Public Notice, the Bureau focuses on the potential burden on USAC of having to consider whether particular bundling offers fit under the bundling rule, but ignores the significant burden on USAC of processing an exponentially larger number of cost-allocation filings if the bundling rule were now eliminated. As noted above, there may be no solid data on which to base such cost-allocation filings, increasing the difficulty for USAC to determine whether they are reasonable.

A cost-allocation requirement also would significantly increase burdens on E-rate applicants and service providers, which would have to work together to prepare cost-allocation

²¹ 47 C.F.R. § 54.511(b).

²² 47 C.F.R. § 54.500(f).

²³ 47 C.F.R. § 54.511(b).

²⁴ 47 C.F.R. § 54.500(f).

²⁵ If the Bureau nevertheless requires cost allocation, it must remove this ambiguity regarding application of the LCP rule. *See infra* Section V.

showings for many requests that do not require such justification today. Some of the data needed to support cost allocations may involve sensitive and confidential commercial information about the wholesale prices of devices that cannot be made available even to the E-rate applicant, and would have to be kept confidential by USAC and the Commission. This confidential flow of information would increase costs on burdens on USAC and service providers.

All of these additional costs and burdens of a cost allocation requirement certainly would exceed the speculative cost of administering the bundling rule – particularly as clarified and narrowed above.²⁶

V. IF THE BUREAU REVERSES THE *GIFT RULE CLARIFICATION ORDER*, IT SHOULD TAKE STEPS TO MINIMIZE THE IMPACT OF THE COST-ALLOCATION REQUIREMENT

For the reasons discussed above, the Commission should not eliminate the bundling rule and impose an across-the-board cost allocation requirement. If the Commission nevertheless does so, however, it should take steps to minimize the negative consequences of the rule change on important services provided under the program.

First, the Commission should not apply the new cost-allocation requirement to any existing multiyear contracts that were validly executed under the bundling rule. It would create an unreasonable burden on educational entities and service providers to renegotiate every multiyear contract that includes bundled equipment or other ineligible equipment or services. Such contracts should be grandfathered and treated as valid during their entire term.

Second, for new contracts, the Commission should delay the implementation of the new rule for at least one full funding year in order to allow educational entities and service providers sufficient time to change their processes to account for the cost-allocation requirement. The

²⁶ See *supra* Section IV.A.

Public Notice proposes to impose the cost-allocation requirement with the 2014 funding year, but the application and preparation process for 2014 already is underway. A change of this magnitude should not occur before funding year 2015 or later.

Third, the Commission must clarify how service providers that offer bundled plans to the general public can comply with the LCP rule and the cost-allocation requirement. As noted above, an across-the-board cost-allocation requirement may make it difficult for service providers to offer the lowest corresponding price to E-rate applicants for “similar services.”²⁷ It will be difficult enough for service providers to know how to present cost-allocation showings for bundled equipment that is offered to the public and enterprise customers for free or reduced prices without worrying about running afoul of another rule in the process.

Finally, if the Commission requires cost-allocation for bundled plans including equipment, it should make clear the provisions for the handling of commercially sensitive confidential information about the wholesale prices of equipment. Service providers will not be able to provide this information to E-rate customers; as a result, the normal process – in which the cost-allocation showing is prepared by the E-rate applicant – will not be practical. The Commission must provide an alternative mechanism that recognizes the confidentiality of this information.

CONCLUSION

The bundling rule is superior to a broad cost-allocation requirement. Rather than imposing a broad new cost-allocation requirement that would cause significant problems and negatively impact the program, the Bureau should instead implement the more limited

²⁷ See *supra* Section IV.B.

clarifications needed to ensure that the bundling rule remains a serviceable and beneficial element of the E-rate rules.

Respectfully submitted,

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