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

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

COMMENTS OF

CONSOLIDATED COMMUNICATIONS, FAIRPOINT COMMUNICATIONS, FRONTIER COMMUNICATIONS, HAWAIIAN TELCOM, INC., IOWA TELECOMMUNICATIONS SERVICES, SPRINT NEXTEL CORPORATION, SUREWEST COMMUNICATIONS, WINDSTREAM COMMUNICATIONS, CTIA – THE WIRELESS ASSOCIATION®, ITTA, NTCA, OPASTCO, USTELECOM, WTA

I. INTRODUCTION AND BACKGROUND

The undersigned parties (the Joint Parties)[1] submit these comments in support of the Petition filed by the United States Telecom Association and CTIA – The Wireless Association® (the Petitioners). On March 19, 2010, the Petitioners submitted a petition for declaratory ruling (Petition) to clarify several issues involving the scope and meaning of the Commission's "lowest corresponding price" rule element of the E-rate program.[2] The Joint Parties are organizations

[1] The Joint Parties are organizations that supply E-Rate services to schools and/or libraries or associations that represent such service providers and consist of the following companies and associations: Consolidated Communications, Fairpoint Communications, Inc., Frontier Communications Corp., Hawaiian Telcom, Inc., Iowa Telecommunications Services, Inc., Sprint Nextel Corporation, SureWest Communications, Windstream Communications, Inc., CTIA – The Wireless Association®, the Independent Telephone & Telecommunications Alliance, the National Telecommunications Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunication Companies, the United States Telecom Association, and the Western Telecommunications Alliance.

[2] Petition by 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, WC Docket No. 02-6 (filed Mar. 19, 2010) (*Petition*). The "lowest corresponding price" is defined as "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." 47 C.F.R. § 54.500(f). The rule mandates that service providers cannot charge schools, school districts, libraries, library consortia, or consortia including any of these entities a price above the lowest corresponding price for supported services, unless the Commission, with

that supply E-Rate services to schools and/or libraries or associations that represent such service providers.

Petitioners request clarification from the Commission that: 1) the lowest corresponding price obligation applies only to competitive bids submitted by a provider in response to a Form 470; 2) the lowest corresponding price obligation is not a continuing obligation that entitles a school or library to a constantly recalculated lowest corresponding price during the term of a contract; 3) there are no specific procedures that a service provider must use to ensure compliance with the lowest corresponding price obligation; 4) in determining whether a service bundle complies with the lowest corresponding price obligation, discrete elements in such bundles need not be individually compared and priced; and 5) in a challenge regarding whether a provider's bid satisfies the lowest corresponding price obligation, the initial burden falls on the challenger (*i.e.*, a school or library) to demonstrate a prima facie case that the bid is not the lowest corresponding price.[3]

The Joint Parties support grant of the Petition. Issuance of such ruling by the Commission is consistent with the statutes, rules and orders governing the E-Rate program. The Joint Parties maintain that grant of the Petition would provide much needed and timely guidance to the Commission's oversight of the E-Rate program.

II. Lowest Corresponding Price Obligation Should Only Apply to Competitive Bids Submitted By a Provider in Response to a Form 470.

The Joint Parties agree that the lowest corresponding price obligation should be read only to apply to competitive bids submitted by a provider in response to a Form 470. The Petitioners are correct in their assertion that such an interpretation is supported by the plain language,

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respect to interstate services or the state commission with respect to intrastate services, finds that the lowest corresponding price is not compensatory. *See* 47 C.F.R. § 54.511(b).

[3] *Petition* at 1. *See also* 47 C.F.R. § 54.511(b).

purpose, and structure of the E-Rate rules and related Commission orders. The Joint Parties also agree that such an interpretation is consistent with the governing statute for the E-Rate program.

The entire E-Rate program is premised on the fundamental requirement that lowest corresponding price obligations are directly tied to the presence of competitive bids submitted by a provider in response to a Form 470. It is clear from the E-Rate rules that there is an express mandate that schools and libraries seeking to participate in the E-Rate program invite competitive bids for service, actually consider each bid, and then select one of those bids.[4] The Joint Parties agree with the Petitioners that "limiting the lowest corresponding price obligation to submitted competitive bids is the only way to ensure that providers have timely and fair notice of the obligation."[5] Such a reading is clear from the Commission's established rules – which repeatedly refer to "rate[s] *offered*"[6] – as well as its previous interpretation of its E-Rate rules.[7]

The Joint Parties agree that to do otherwise would create an environment that is "unworkable."[8] The statute governing E-Rate programs requires such mechanisms to be "specific" and "predictable,"[9] and, as noted by the Petitioners, it would be "impossible to make a complete and thorough determination of the lowest corresponding price at the point-of-sale, in the thousands of retail environments across the nation, for each purported E-Rate customer."[10]

Finally, the Joint Parties agree with the Petitioners that "restricting the lowest corresponding price obligation to submitted competitive bids would not present any risks for

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[4] *See Id.*, pp. 18-19.

[5] *Id.*, p. 21.

[6] *See e.g.*, 47 C.F.R. § 54.504(e)(1) (emphasis added); *Id.*, (stating that ""[s]chools, libraries and consortia including those entities may request lower rates if the rate *offered* by the carrier does not represent the lowest corresponding price.") (emphasis added).

[7] *See e.g.*, *Petition*, pp. 23 – 24 (discussing the Commission's findings in its *Universal Service Report and Order*.).

[8] *Petition*, p. 23.

[9] 47 U.S.C. § 254(b)(5).

[10] *Petition*, p. 23.

schools and libraries."[11] Contracts negotiated at the state level "are typically highly efficient and cost-effective means for schools and libraries when purchasing service."[12] Moreover, such contracts are ensured further efficiency and cost-effectiveness due to the non-discrimination protections afforded through Section 202(a) of the Act.

III. The Lowest Corresponding Price Obligation Should Not Be a Continuing Obligation.

The Joint Parties agree that the Commission's rules regarding E-Rate pricing "do not include any continuing obligation to recalculate the lowest corresponding price over the life of a contract."[13] Previous Commission rulings are clear that any changes to E-Rate pricing are best achieved through a new competitive bidding process, and not through a continuing lowest corresponding price obligation on providers.

As the Petitioners note, "[i]f the lowest corresponding price obligation was a continuing requirement, the price terms in master contracts negotiated under the E-Rate bidding requirements could never be outdated."[14] Instead, the Commission encouraged schools and libraries to "issue new requests for bids . . . rather than obtain service under the terms of [a] master contract."[15] The lowest corresponding price obligation is not a continuing obligation that entitles a school or library to a constantly recalculated lowest corresponding price.

The Joint Parties agree that continuing lowest corresponding price obligations on providers would be "unworkable as a practical matter," and would "run afoul" of statutory

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[11] *Petition*, p. 24.

[12] *Id.*, p. 24.

[13] *Id.*, p. 26.

[14] *Id.*, p. 26.

[15] *Fourth Universal Service Order on Reconsideration* ¶ 234. The Commission reached this conclusion based on its view that because "a master contract that was put out for bid several years ago but has not yet expired might not reflect the cost reductions resulting from recent entry into the local exchange market by, for example, wireless carriers." *Id.*

requirements that universal service support mechanisms be "specific" and "predictable."[16] Such an approach would equate to an absence of finality on E-Rate contracts and would create an unjustifiable administrative burden, particularly for smaller entities seeking to provide such services.

IV. Service Providers Are Not Required To Ensure Continuing Compliance with the Lowest Corresponding Price Obligation.

There is no Commission requirement that service providers are under a continuing obligation to ensure compliance with the lowest corresponding price obligation. Rather, the Commission's rules are focused on outcomes, and not any ongoing compliance requirement to ensure the lowest corresponding price for supported services.[17]

The Commission's compliance requirement for E-Rate service providers is laudably flexible since it prescribes no specific procedures to ensure compliance with the lowest corresponding price obligation. For example, service providers must only "retain documents related to the delivery of discounted telecommunications and other supported services for at least 5 years after the last day of the delivery of discounted services."[18] Such retention requirements do not mandate that these same documents demonstrate compliance with the lowest corresponding price obligation. Although once considered by the Commission, it never adopted a requirement that service providers certify that the price they offer to schools and libraries "is no greater than the lowest corresponding price."[19]

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[16] *Petition*, p. 26. *See also*, 47 U.S.C. § 254(b)(5).

[17] For example, the Commission's rule setting forth the obligation states only that "[p]roviders of eligible services shall not charge schools, school districts, libraries, library consortia, and consortia including any of those entities a price above the lowest corresponding price for supported services." 47 C.F.R. § 54.511(b).

[18] *Id.* § 54.516(a). The rule also mandates that "[a]ny other document that demonstrates compliance with the statutory or regulatory requirements for the schools and libraries mechanism … be retained as well." *Id.*

[19] *Universal Service Report and Order* ¶ 487.

Because E-Rate service providers vary by size, location, sophistication, market focus, technologies used, and services offered, it would not make sense for the Commission to mandate a particular compliance process. The Joint Parties agree with the Petitioners that a "one-size-fits-all" process is not only impractical, it is also unnecessary.[20] Instead, the controlling factor in the E-Rate process should be whether schools and libraries are in fact provided bids from service providers containing the lowest corresponding price, and not the process by which the service providers arrived at their respective bids.

V. Compliance with the Lowest Corresponding Price Obligation Does Not Require Discrete Elements in Service Bundles to be Individually Compared and Priced.

Discrete pricing elements in service element bundles are irrelevant to determining the lowest corresponding price for such services. Rather, the Joint Parties agree with the Petitioners – based on the Commission's existing rules and precedent – that "the only sensible understanding of the lowest corresponding price is that it need only be based on prices for a similar *set* of services."[21]

The Petition contains a detailed discussion of how the Commission's existing rules and precedent support the view "the only sensible understanding of the lowest corresponding price is that it need only be based on prices for a similar *set* of services."[22] The Joint Parties agree that the practical effect of the Commission's repeated use of the phrase "similar set of services," "plainly contemplates that bundles of services . . . can be treated as bundles and need not be disaggregated or individually priced for purposes of determining the lowest corresponding

[20] *Petition*, p. 29.
[21] *Id.*, p. 30.
[22] *Id.*, p. 30.

price."[23] The Joint Parties urge the Commission to adopt this approach that is clearly outlined in its rules and existing precedent.

VI. The Commission Should Clarify its Rules Regarding Challenges to Lowest Corresponding Price Obligations.

The Joint Parties agree with the Petitioners' assessment that the burden-shifting analysis used by the Commission in Section 202(a) should be applied to the lowest corresponding price obligation.[24] Under a Section 202(a) analysis, once a complainant has made a prima facie showing, the burden shifts to the carrier to "show that the discrimination or preference is justified and, therefore, reasonable."[25] Due to their similarities, the Joint Parties urge the Commission to adopt the approach recommended by the Petitioners.

As applied in the E-Rate context, a prima facie showing would need to be made by any complainant alleging that a service provider has failed to comply with its lowest corresponding price obligation, by demonstrating that the service provider had provided a lower price to similarly situated parties for similar services within the relevant time period. The presence of such a prima facie showing would shift the burden to the service provider, which would need to justify its lowest corresponding price calculation.

Finally, the Joint Parties support a requirement that any bid based on standard, widely available terms and conditions would be presumptively considered the lowest corresponding price. Absent a demonstration by the complainant of unusual or unique circumstances, such

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[23] *Id.*, p. 30.

[24] *Id.*, pp. 31 – 32. For Section 202(a), "[a] complainant alleging that a carrier has engaged in unlawful discrimination … must make a prima facie showing that the carrier has discriminated in connection with a 'like communication' service or has given an 'advantage or preference' to a person or group of person in connection with such service." *See RCI Long Distance, Inc. v. New York Tel. Co.*, Memorandum Opinion and Order, 11 FCC Rcd 8090, ¶ 37 (2006).

[25] *Id.*

rates can safely be considered the lowest price that a service provider charges to a customer subscribing to those same services.

VII. If the Commission Disagrees with Petitioners' Requests for Clarification, Any Contrary Interpretations of the E-Rate Rules Must Be Prospective Only.

The Joint Parties also agree with the Petitioners that any contrary finding by the Commission with respect to the Petition must be prospective only. As Petitioners note, absent a showing of fair notice, the agency may not impose any penalty for past conduct, including a finding of liability.[26]

There is no mention in the regulations, the statute or previous Commission orders that contradict the clarifications sough in the Petition. Any contrary finding by the Commission to impose new or additional burdens on service providers would not satisfy the legal threshold necessary for fair notice. Accordingly, any such interpretation may not serve as the basis for any sanctions for past conduct, including any finding of liability or fines, and instead must be limited to purely prospective effect.

VIII. Conclusion.

For the foregoing reasons, the Commission should clarify the lowest corresponding price obligation of the E-Rate program as requested by Petitioners. Such clarifications follow from the plain language of the E-Rate rules, the Commission's E-Rate orders, and the governing statute for the E-Rate program, and would provide needed and timely guidance in light of recent developments. The Petition should therefore be granted.

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[26] *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995). The Petitioners note a finding by the D.C. Circuit that a regulation provides fair notice consistent with fundamental principles of due process only if "a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform."*Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000).

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