

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	CC Docket No. 02-6
)	
Wireline Competition Bureau Seeks Comment)	WC Docket No. 10-90
on Petitions Regarding Off-Campus Use of)	
Existing E-rate Supported Connectivity)	WC Docket No. 13-184
)	

Comments of WTA – Advocates for Rural Broadband

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Date: November 3, 2016

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EXECUTIVE SUMMARY

As carriers serving some of the most remote, sparsely populated, and geographically challenging areas across the country, WTA's members and other small rural local exchange carriers ("RLECs") understand first-hand the challenges facing rural and remote locations in obtaining modern telecommunications services. WTA's members share the goals of ensuring ubiquitous availability of broadband at reasonably comparable and affordable rates for all Americans to bridge the urban-rural digital divide and close the Homework Gap and have supported modernizing the Commission's universal service programs to address the broadband needs of rural and low-income consumers. WTA agrees that utilizing innovative technologies offers a novel approach to broadband deployment. WTA is concerned, however, that discarding critical waste and fraud prevention provisions in the E-rate rules as the Petitions request will further confuse the distinct purposes of the Commission's Universal Service programs and will encourage overbuilding of networks supported by the Connect America Fund ("CAF") thereby impeding effective implementation of the Commission's overall universal service policy goals and increasing the burden on rate-payers.

Because the Petitions present novel questions of fact, law and policy which must be addressed – if at all – by the full Commission, and permitting off-campus use of E-rate supported networks without cost allocation would be unlawful and unwise as a matter of effective implementation of overall universal service policy, WTA urges the Wireline Competition Bureau to dismiss both Petitions.

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Comments of WTA – Advocates for Rural Broadband

WTA-Advocates for Rural Broadband (“WTA”)¹ hereby submits these comments in response to the Public Notice² issued by the Wireline Competition Bureau (“the Bureau”) seeking comment on two petitions requesting that the Commission waive its rules requiring E-rate support recipients to cost allocate the portion of traffic on E-rate subsidized broadband networks attributable to off-campus use (“the Petitions”).³

I. Introduction

As carriers serving some of the most remote, sparsely populated and geographically challenging areas across the country, WTA’s members and other small rural local exchange carriers (“RLECs”) understand first-hand the challenges facing rural and remote locations in

¹ WTA – Advocates for Rural Broadband is a national trade association representing more than 300 rural telecommunications providers offering voice, broadband and video-related services in rural America. WTA members serve some of the most rural and hard-to-serve communities in the country and are providers of last resort to those communities.

² Wireline Competition Bureau Seeks Comment on Petitions Regarding Off-Campus Use of Existing E-rate Supported Connectivity, DA 16-1051, CC Docket No. 02-6; WC Docket No. 10-90; WC Docket No. 13-184 (Rel. Sept. 19, 2016) (“Public Notice”).

³ Joint Petition for Clarification or, in the alternative, Waiver of Microsoft Corporation, Mid-Atlantic Broadband Communities Corporation, Charlotte County Public Schools, Halifax County Public schools, GCR Company, and Kinex Telecom, WC Docket No. 13-184 (filed Jul. 7, 2016) (“Charlotte/Halifax Petition”); Petition for Waiver of Samuelson-Glushko Technology Law & Policy Clinic on behalf of Boulder Valley School District, WC Docket Nos. 13-184, 10-90 (filed May 16, 2016) (“Boulder Valley Petition”).

obtaining modern telecommunications services, and share the goals of ensuring ubiquitous availability of broadband at reasonably comparable and affordable rates for all Americans to bridge the urban-rural digital divide and close the Homework Gap. WTA has supported modernizing the Lifeline program to provide low-income consumers discounts for broadband service, as well as actively supporting efforts to modernize the critically important Connect America Fund to address the broadband needs of rural America.

The two petitions under review “seek to allow schools and school districts to leverage existing E-rate supported service to allow Internet traffic originating at students’ homes to be directed to and carried over E-rate supported networks without creating an obligation on the applicant to cost allocate out the portion of the traffic attributable to off-campus use.”⁴ The petition filed by Microsoft Corporation, *et al.*, (“Charlotte/Halifax Petition”) seeks clarification that cost allocation of traffic that originates off-campus is not required if TV White Spaces (“TVWS”) are used to extend E-rate supported Internet access service to the homes of students in and around those schools for educational purposes.⁵ Alternatively, the Charlotte/Halifax Petition requests a waiver of the Commission’s rules to permit implementation of a pilot project using TVWS for off-campus use without cost allocation. The second petition filed on behalf of Boulder Valley School District (“Boulder Valley Petition”) seeks a waiver of the cost allocation rule to permit students living in nearby housing authorities to get Internet access through Boulder Valley’s self-provisioned and E-rate supported fiber network without Boulder Valley cost allocating off-campus service from its E-rate funding requests.⁶

⁴ Public Notice at 3.

⁵ Charlotte/Halifax Petition at i.

⁶ Boulder Valley Petition at 3.

Both petitions argue that the Bureau has authority to grant the requested waivers, and that such grant will not impose any additional costs to the USF because last-access points will be provided with outside funding,⁷ that participating providers have agreed not to increase charges for non-metered use of E-rate discounted bandwidth,⁸ and that there will be enough bandwidth after-hours to meet students' needs without incurring additional cost because the networks are designed to ensure sufficient bandwidth during schools hours.⁹

The Petitions present novel questions of fact, law and policy which must be addressed – if at all – by the full Commission. Moreover, granting the Petitions to permit off-campus use of E-rate supported networks without cost allocation would be unlawful and unwise as a matter of effective implementation of overall universal service policy. WTA agrees that utilization of TVWS and other innovative technologies offers a novel approach to broadband deployment, and some of WTA's members have likewise explored use of TVWS to supplement broadband deployment in very costly locations. WTA is concerned, however, that discarding critical waste and fraud prevention provisions in the E-rate rules as the Petitions request will further confuse the distinct purposes of the Commission's Universal Service programs and will encourage overbuilding of networks supported by the Connect America Fund ("CAF") thereby impeding effective implementation of the Commission's overall universal service policy goals and increasing the burden on rate-payers.

II. The Communications Act and the Commission's Rules Prohibit Off-Campus Use of E-rate Supported Network Capacity Without Cost Allocation.

⁷ Charlotte/Halifax Petition at 7 & n. 14.

⁸ *Id.* at 13.

⁹ Boulder Valley Petition at 4; Charlotte/Halifax Petition at 13 (stating that the schools E-rate-supported internet access services are not usage-metered).

The Commission’s existing E-rate rules require that traffic originating off-campus over E-rate supported networks be cost allocated.¹⁰ The E-rate Eligible Services List specifically requires that wireless services used off-campus be cost allocated out of a funding request.¹¹ The Commission recognized that cost allocation is required when E-rate supported networks are used for off-campus use when it adopted rules, including temporary waiver of the E-rate cost allocation rules, for a pilot program to support off-premises access by wireless devices.¹²

Moreover, as the Public Notice recognizes, services and facilities funded by E-rate for uses that are not primarily for educational purposes are not eligible for E-rate support.¹³ The Commission has determined that “educational purposes” means “activities that are integral, immediate, and proximate to the education of students.”¹⁴ The Commission’s rules presume that

¹⁰ 47 C.F.R. § 54.504(e). See Boulder Valley Petition at 3 (noting that “the current cost allocation rule would require a school district to cost-allocate service for the portion of the network that runs to the [affordable housing] complex and remove that portion from the district’s request for E-rate funding”). See also *E-rate Deployed Ubiquitously 2011 Pilot Program*, WC Docket No. 10-222, Order, 26 FCC Rcd 9526, ¶ 2 (WCB 2011) (“*EDU2011 Pilot Program Order*”) (stating that the E-rate program currently “requires applicants to cost-allocate support for use of wireless Internet access off the school’s or library’s premises.”).

¹¹ *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Order, 30 FCC Rcd 9923, 9936 (WCB 2015). See also *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Notice of Proposed Rulemaking, 28 FCC Rcd 11304, 11398, ¶ 321-22 (2013) (explaining that services used off school or library property at generally ineligible for E-rate support because they are not deemed to be used for “educational purposes” and noting conditions imposed on after hours use of E-rate funded services). The Charlotte/Halifax County Petition distinguishes between TVWS technology extending on-premises internet connectivity rather than a cellular network, arguing that TVWS access does not need to be cost-allocated out of a funding request because it is not a “wireless” service. See *Charlotte/Halifax Petition* at 15-16.

¹² See *Schools and Libraries Universal Service Support Mechanism, A National Broadband Plan for our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Order, 25 FCC Rcd 18762, ¶ 41 (2010) (“*Sixth E-rate Report and Order*”) (stating that “[i]f a device that provides wireless Internet access service . . . is taken off school or library premises, . . . applicants are required to cost-allocate the dollar amount of support for wireless Internet access use for the time that the device is not at the school or library and remove that portion from its E-rate funding request.”). See also *EDU2011 Pilot Program Order* at ¶ 2 (acknowledging the requirement that “applicants . . . cost-allocate support for use of wireless Internet access off the school’s or library’s premises.”).

¹³ Public Notice at 2.

¹⁴ 47 C.F.R. § 54.500.

services used on school or library property are serving an educational purpose.¹⁵ Specifically to guard against fraud, waste and abuse, the Commission requires schools and libraries to certify that they use E-rate discounted services for educational purposes.

The Charlotte/Halifax Petition states that certain off-premises uses of supported services are permissible without cost allocation.¹⁶ However, circumstances such as school bus drivers using wireless services while delivering children to and from school or teachers using wireless services while accompanying students on a field trip are readily distinguishable from the use of Internet access service by students at their homes.

The Charlotte/Halifax Petition also states that “a bias toward geographic restrictions on the use of E-rate supported services persists, though such restrictions are not explicitly imposed by statute.”¹⁷ However, a review of the structure and legislative history of Section 254 of the Communications Act, as amended, (“the Act”) makes clear that the E-rate program was designed to provide discounts for telecommunications services provided *to school classrooms and libraries* for educational purposes and that geographically limiting use of E-rate support was a deliberate policy choice codified to foster a more effective overall telecommunications universal service policy. Section 254 codifies a comprehensive, national universal service policy and establishes (or codifies) four distinct programs to address unique circumstances to promote deployment and adoption of telecommunications services. While at the same time recognizing establishment of explicit support mechanisms for deployment of telecommunications services in rural areas and retaining the Commission’s ongoing efforts to provide low-income consumers monetary assistance for telecommunications services, Congress established as a principle of

¹⁵ *Id.*

¹⁶ Charlotte/Halifax Petition at 6, n.36.

¹⁷ *Id.* at 6.

universal service policy that “[e]lementary and secondary *schools and classrooms*, healthcare providers, and libraries should have access to advanced telecommunications services.”¹⁸

The text of Section 254 more specifically describe Congress’ vision for enabling schools’ and libraries’ access to telecommunications services by establishing that “all telecommunications carriers serving a geographic area shall, . . . *provide such services to elementary schools, secondary schools, and libraries* for educational purposes at rates less than the amounts charged for similar services to other parties.”¹⁹ The Telecommunications Act of 1996 Conference Report also reveals that establishment of the rural health care and E-rate programs in Section 254(h) of the Act “is intended to ensure that health care providers for rural areas, elementary and secondary school *classrooms*, and libraries have affordable access to modern telecommunications services that will enable them to provide medical and educational services to all parts of the Nation.”²⁰ Accordingly, the text and legislative history of Section 254 make clear that E-rate support is restricted to providing discounts for telecommunications services provided on public school and library campuses while the other universal service programs are designed to address access and affordability issues for rural and low-income consumers.

Because existing E-rate rules require cost-allocation for use of excess network capacity off-campus, E-rate entities seeking to extend their E-rate supported networks for off-campus use without allocating such costs from their E-rate funding request must first obtain a waiver of the cost allocation rules.

III. The Bureau Lacks Authority to Grant the Petitions and Doing So Would Impede Effective Implementation of Overall Universal Service Policy.

¹⁸ 47 U.S.C. § 254(b)(6) (emphasis added)

¹⁹ 47 U.S.C. § 254(h)(1)(B) (emphasis added).

²⁰ Telecommunications Act of 1996, Conf. Rpt. 104-230, 104th Cong., 2d Sess. at 132 (1996).

The Commission may waive its rules for good cause shown.²¹ Such waivers are appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.²² Whereas the Bureau may approve certain waivers on delegated authority,²³ it lacks authority to grant waivers like those requested by Charlotte/Halifax and Boulder Valley because they “present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines.”²⁴

The Charlotte/Halifax Petition admits the novelty of its proposal when it states that the ESL “simply does not contemplate” a scenario in which a Category One Internet access service is extended for off-campus use by students.²⁵ Additionally, the only previous actions by the Commission allowing E-rate supported networks to be used off-campus without cost allocation involved circumstances vastly different from the Petitions under review. The Commission granted the State of Alaska a limited waiver of section 54.504(b)(2)(ii) of the Commission’s rules (which requires certification that E-rate services be used “solely for educational purposes”) because “there [was] no local or toll-free dial-up Internet access” available whatsoever to members of rural remote communities in Alaska.²⁶ Additionally, the limited waiver permitted members of rural remote communities to use excess service obtained through E-rate only when the services were not in use by the schools and libraries for educational purposes.²⁷ Similarly, in

²¹ See 47 C.F.R. § 1.3.

²² *WAIT Radio v. FCC*, 418 F.2d 1164, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

²³ See 47 C.F.R. § 0.291(a).

²⁴ 47 C.F.R. § 0.291(a)(2).

²⁵ Charlotte/Halifax Petition at 15-17.

²⁶ *Petition of the State of Alaska for Waiver of the Utilization of Schools and Libraries Internet Point-of-Presence in Rural Remote Alaska Villages Where No Local Access Exists and Request for Declaratory Ruling*, Order, CC Docket No. 96-45, 16 FCC Rcd. 21511, ¶ 1 (Dec. 3, 2001) (“*Alaska Order*”).

²⁷ *Alaska Order* at ¶ 5-6.

authorizing the EDU2011 Pilot Program to temporarily support portable devices off-campus, the Commission stated that it expected most pilot programs to “provide connectivity for limited purposes, for example downloading digital textbooks” rather than providing unbounded access to the Internet.²⁸

The instant Petitions make no claim that prospective student households will include only those households lacking *any* available Internet access service as was the case in *Alaska*.²⁹ Indeed, the Petitions recognize that some prospective student participants may have a network available but their households simply cannot afford it. Connectivity as proposed in the Petitions is also substantially broader than to simply allow the downloading of textbooks or Internet browsing in a “walled garden” as the Commission expected in the EDU2011 Pilot Program. Nor do the Petitions propose to restrict student access to when the services are in use by the schools during school hours, as the Commission has required in the *Alaska Order* and when it permitted schools to allow community use in schools during non-school hours.³⁰

Moreover, even if there were Commission precedent applicable to the subject waiver petitions, there are no special circumstances that would support granting the waiver requests. Doing so would likely impede effective implementation of the Commission’s overall universal service policy goals, contrary to the public interest.

Section 254 strikes a reasonable and equitable balance between providing support for residential telecommunications infrastructure deployment through the High-Cost program and affordability for consumers and other select institutional users such as schools and libraries

²⁸ *Sixth E-rate Report and Order* at ¶ 46.

²⁹ *Alaska Order* at ¶1 (permitting off-campus use of satellite broadband services for members of rural remote communities in Alaska “where there is *no* local or toll-free dial-up Internet access”) (emphasis added).

³⁰ *Sixth E-rate Report and Order* at 24-26.

through the Rural Health Care, E-rate and Lifeline programs. The Commission expressly indicated while authorizing the EDU2011 Pilot Program that concerns regarding costs and implications for other universal service programs required “further inquiry and consideration before [off-campus wireless] services should be eligible for support on a program-wide basis.”³¹

At present, it is not clear to WTA the extent to which communities immediately surrounding schools in the lower 48 states lack broadband access. Most rural schools and libraries are located in towns, villages and other population centers, and most such rural population centers have at least some broadband deployment. In the relatively limited areas where this is not the case, the Commission’s CAF programs are designed to address the problem and to promote or require broadband deployment that is reasonably comparable with respect to the speeds and rates of broadband services available to rural residents.

Similarly, to the extent that some surrounding communities have access to broadband but some of their residents do not find service affordable, the problem is addressed not only by the Commission’s CAF programs (which seek reasonably comparable voice and broadband service rates between rural and urban areas), but also by its Lifeline program which seeks to make broadband service affordable for low-income consumers. Although the rural-urban digital divide and the Homework Gap exacerbated by lack of affordability are important issues to address, their existence does not rise to the level of special circumstances warranting the grant of a waiver of the E-rate cost allocation requirement. Ensuring that each of the USF programs are adequately funded and properly structured to achieve their goals would go a long way toward improving broadband access and affordability for all Americans while preventing waste, fraud and abuse in the distinct programs.

³¹ *Id.* at ¶ 43.

What the Commission and Bureau need to avoid here is “mission creep” wherein the E-Rate program expands to provide broadband service to student households – first those near schools and then those farther and farther distant. Before long, there are likely to arise new E-Rate networks which overlap and compete with existing CAF-supported and other broadband networks, and which also duplicate Lifeline support. Authorizing E-rate support recipients to leverage excess network capacity purchased through the E-rate program would encourage, rather than deter, potential waste, fraud and abuse, particularly in light of the possibility that many school districts may qualify for up to 100% discounts on self-provisioned fiber networks through support for self-construction and additional funding incentives when States contribute to self-provisioned fiber projects.³² These expanded E-Rate networks not only will replicate and disrupt existing CAF and Lifeline programs, but also will divert E-Rate funds from entities that seek to focus on the original goal of providing more affordable telecommunications services to schools and libraries.

Furthermore, the Petitions lack sufficient detail regarding key issues that would further illuminate the public interest implications and the impact waiving the cost allocation rule would have on the other universal service programs, or how such a waiver would comport with critical waste, fraud and abuse provisions in the Communications Act and the Commission’s rules. For example, the Petitions lack any discussion of what criteria will be used to determine which students are eligible to participate. The Charlotte/Halifax Petition state that access via TVWS “will be technically possible only in households with a specialized TVWS access point” but lacks any detail regarding which households are or will be eligible to obtain a specialized TVWS

³² *Modernizing the E-rate Program for Schools and Libraries*, WC Docket Nos. 10-90, 13-184, Report and Order, 29 FCC Rcd. 15538, ¶ 55 (Dec. 19, 2014) (authorizing up to a 10 percent match of state funding for special construction charges for last-mile facilities).

access point.³³ Importantly, will households that already obtain Internet access from a local provider – or could obtain access if access were considered affordable – be permitted to participate or will participation be limited to those households without any service options (including fixed, fixed wireless, satellite or cellular services) whatsoever?³⁴ Will students living at locations already or soon-to-be served by carriers subject to High-Cost deployment obligations be permitted to participate? The Petitions also omit discussion of an income or other threshold for determining eligibility to participate based on claims on unaffordability. Will schools and/or carriers supporting the projects become Lifeline Broadband Providers? Will only Lifeline-eligible households be eligible to participate? Will eligible households be required to sign-up for the Commission’s Lifeline program? Must households re-apply annually to confirm that a broadband network is entirely unavailable or remains unaffordable?

With respect to ensuring that E-rate supported networks are used primarily for educational purposes, the Charlotte/Halifax Petition recognizes the likelihood that students will use E-rate-funded internet for non-educational purposes³⁵ but dismisses such concerns by asserting that existing filtering technology and Internet safety policies will govern at-home use of Internet access provided through the project.³⁶ However, given that the Internet safety policies in the Children’s Internet Protection Act address content considered to be harmful to minors, such filtering will do little to prevent widespread use of E-rate-funded Internet for non-education purposes such as watching Netflix, online gaming, or other web browsing to application usage unrelated to educational endeavors. In addition to imposing password requirements, what

³³ Charlotte/Halifax Petition at 10.

³⁴ *See also* Boulder Valley Petition at 1 (requesting a waiver of the cost allocation rule to provide service “in cases where student families do not already have Internet access at home”).

³⁵ Charlotte/Halifax Petition at 10.

³⁶ *Id.*

mechanisms will be in place to ensure that entire households are not using the connection by sharing a password on multiple devices and imposing additional costs on the network by driving up demand for bandwidth beyond the level of normal consumption during school hours? Also, given that peak hours for Internet use are after school hours and that streaming audio and video entertainment services account for more than 70 percent of peak traffic in North America, it is reasonable to assume that at least some students and their family members would use off-campus connectivity for non-educational purposes.

Furthermore, Section 254 explicitly prohibits telecommunications services and network capacity provided to schools, libraries and rural health care providers from being “sold, resold, or otherwise transferred by such user inconsideration for money or *any other thing of value*.”³⁷ Section 254 also explicitly prohibits “for-profit business[es]” from entitlement to preferential rates or treatment provided by Section 254. It is unclear how the Petitioners and their partners intend to comply with the resale prohibition. Neither the Boulder Valley nor Charlotte/Halifax Petitions describe the monthly or other service fees student households will pay to participate. Will installation and ongoing service be entirely free for eligible students? Will the schools or their private sector partners operate as Lifeline Broadband Providers and seek monetary Lifeline reimbursement for provision of service? How do existing partnerships comply with the Commission’s competitive bidding rules, “a central tenet of the E-rate program”?³⁸ Neither Petition cites or otherwise attempts to explain compliance with the statutory prohibition on resale of excess capacity and competitive bidding requirements, either with respect to consideration

³⁷ 47 U.S.C. § 254(h)(3). *See also* 47 C.F.R. § 54.504(a)(1)(v).

³⁸ *Sixth E-rate Report and Order* at ¶ 18. *See also Sixth E-rate Report and Order* at ¶ 47 (waiving the applicable competitive bidding rules for those EDU2011 Pilot Program applicants that already have entered into legally binding agreements for off-premises connectivity).

exchanged between the school, service provider partners, and/or student households or the selection of service provider partners.

IV. Conclusion

WTA understands the importance of closing the rural-urban digital divide and the Homework Gap. However, the Bureau lacks delegated authority to grant the Charlotte/Halifax and Boulder Valley Petitions. Furthermore, special circumstances do not exist here, and granting the Petitions would impede effective implementation of overall universal service policy goals contrary to the public interest. The Bureau should therefore deny both Petitions.

Respectfully Submitted,

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