

December 21, 2016

FILED VIA ECFS

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Notice of Ex Parte, Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6; Modernizing the E-rate Program for Schools and Libraries, WC Docket No. 13-184; Connect America Fund, WC Docket No. 10-90

Dear Ms. Dortch:

On December 19, 2016, the undersigned and Derrick Owens representing WTA – Advocates for Rural Broadband (“WTA”),¹ Mike Jacobs representing ITTA – The Voice of Mid-Sized Communications Companies,² and Kevin Rupy representing USTelecom³ (collectively “the Associations”) met separately with: (1) Nick Degani, legal advisor to Commissioner Ajit Pai; (2) Aaron Garza, Kate Dumouchel, Ikenna Ofobike, and Ryan Palmer of the Telecommunications Access Policy Division and Madeleine Findley, Deputy Bureau Chief of Wireline Competition Bureau; and (3) Amy Bender, legal advisor to Commissioner Mike O’Rielly, to discuss the Public Notice⁴ seeking comment on two petitions⁵ (“the Petitions”) pending before the Bureau

¹ WTA – Advocates for Rural Broadband is a national trade association representing more than 350 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 ITTA serves as the voice of mid-size communications companies before policymakers. ITTA’s members provide a variety of communications services, including voice, high speed data, and video, to subscribers in predominantly rural areas in 45 states.

³ USTelecom is the premier trade association representing service providers and suppliers for the telecom industry. Its diverse member base ranges from large publicly traded communications corporations to small companies and cooperatives – all providing advanced communications service to both urban and rural markets..

⁴ See *Wireline Competition Bureau Seeks Comments on Petitions Regarding Off-Campus Use of Existing E-rate Supported Connectivity*, Public Notice, WC Docket Nos. 13-184, 10-90, CC Docket No. 02-6 (rel. Sept. 19, 2016).

⁵ See, Petition for Waiver on behalf of Boulder Valley School District Samuelson-Glushko Technology Law & Policy Clinic (TLPC), WC Docket No. 13-184, WC Docket No. 10-90 (submitted May 16, 2016) (“*Boulder Valley Petition*”); Joint Petition for Clarification or, in the Alternative, Waiver of Microsoft Corporation, Mid-Atlantic Broadband Communities Corporation, Charlotte County Public Schools,

which seek waiver of E-rate rules which require E-rate recipients to cost-allocate off-campus use of E-rate services from funding requests.

At the outset of each meeting, the association representatives expressed their memberships' strong support for policies that aim to achieve the important public policy goal of closing the "homework gap" by improving the availability and affordability of broadband Internet access services for all Americans. As reflected in their comments,⁶ the Associations strongly believe, however, that closing the "homework gap" is best addressed through application of more appropriate Universal Service Fund ("USF") programs, including the Connect America Fund ("CAF") for closing the gap in availability and the Lifeline program for closing the gap in affordability. Using discrete USF programs at cross-purposes as envisioned in the Petitions would be an inefficient use of limited funds and will only undermine the viability of all USF programs, including E-rate.

The Associations noted that granting the Petitions would run counter to the definition of an "educational purpose" as contained in section 254(h) of the Communications Act and further clarified in subsequent rulings by the Commission. Section 254(h) plainly states that discounted services supported by E-rate must be provided "to elementary schools, secondary schools, and libraries for educational purposes[.]"⁷ In 2003, the Commission clarified the definition of "educational purpose" to mean "activities that are integral, immediate, and proximate to the education of students"⁸ taking into account the "*statutory mandates that the purpose for which [E-rate] support is provided be for educational purposes in a place of instruction.*"⁹ The Commission also made clear that discounts in the E-rate program "will only be awarded to support activities that have a defined nexus to education" when it authorized limited off-campus use by school personnel.¹⁰ The Associations distinguished the Petitions' lack of proposed safeguards from each instance in which the Commission has authorized limited expanded use of

Halifax County Public Schools, GCR Company, and Kinex Telecom, WC Docket No. 13-184 (submitted June 7, 2016) ("*Charlotte/Halifax Petition*").

⁶ See Comments of ITTA – The Voice of Mid-Size Communications Companies, WC Docket Nos. 13-184, 10-90, CC Docket No. 02-6 (Nov. 3, 2016); see also, Comments of USTelecom, WC Docket Nos. 13-184, 10-90, CC Docket No. 02-6 (Nov. 3, 2016) ("*USTelecom Comments*"); Reply Comments of USTelecom, WC Docket Nos. 13-184, 10-90, CC Docket No. 02-6 (Dec. 5, 2016) ("*USTelecom Reply Comments*"); Comments of WTA-Advocates for Rural Broadband, WC Docket Nos. 13-184, 10-90, CC Docket No. 02-6 (Nov. 3, 2016).

⁷ 47 U.S.C. § 254(h)(1)(B).

⁸ See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202, 9208, ¶ 17 (rel. April 30, 2003) ("*Second Report and Order*").

⁹ *Id.* at ¶ 20 (emphasis added).

¹⁰ *Id.* at ¶ 21.

E-rate services, including the *Alaska Order*,¹¹ permitting community use,¹² and the E-rate Deployed Ubiquitously 2011 Pilot Program.¹³

The Associations further noted that grant of the Petitions would violate the bedrock universal service principles of specificity, predictability and explicitness codified in Section 254 to the extent that the Petitions seek to accomplish CAF goals of improving broadband availability and to the extent that the Petitions seek to accomplish Lifeline program goals of improving broadband affordability. As the Commission has previously concluded, Congress did not intend each universal service principle to be fully addressed by each separate support mechanism, rather “[t]he four universal service programs work in tandem to accomplish the principles set forth in section 254(b).”¹⁴ The Associations highlighted instances in which the Commission expressly declined to use one of the USF support programs in furtherance of the goals of another, including recognition in the “rate floor” proceeding that the Lifeline program aims to ensure that rates are affordable for low-income consumers.¹⁵

The Associations next explained substantial concerns with respect to the ability of Petitioners to comply with the statutory prohibition on the resale or transfer of excess capacity purchased through the E-rate program. The Communications Act and Commission precedent is clear that excess capacity shall not be resold or transferred “for money or any other thing of value.”¹⁶ The Commission has previously imposed stringent conditions to ensure compliance with the resale

¹¹ See *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*, CC Docket No. 96-45, Order, 16 FCC Rcd. 21511 (2001) (“*Alaska Order*”).

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, ¶¶ 24-26 (2010) (“*Sixth E-rate Report and Order*”) (establishing rules for community use of E-rate services during non-operating hours).

¹³ See *Sixth E-rate Report and Order* at ¶ 46 (expecting “that most of these proposals will not provide broad access to the Internet, but instead will provide connectivity for limited purposes, for example downloading digital textbooks”).

¹⁴ *High Cost Universal Service Support; Federal-State Joint Board on Universal Service; Joint Petition of the Wyoming Public Service Commission and the Wyoming Office of Consumer Advocate for Supplemental Federal Universal Service Funds for Customers of Wyoming’s Non-Rural Incumbent Local Exchange Carrier*, Order on Remand and Memorandum Opinion and Order, 25 FCC Rcd 4072, 4086-87, ¶¶ 26-27 (2010) (“*Qwest II Remand Order*”).

¹⁵ *Connect America Fund et al.*, Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking, 29 FCC Rcd 7051, 7077, ¶ 77 (2014) (citing *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, Order and Notice of Proposed Rulemaking, 25 FCC Rcd 4136, 4156-58, ¶¶ 34-35 (2010) (finding that the low-income support program – not high-cost support – is the program best suited to address issues of affordability and subscribership in Puerto Rico)).

¹⁶ 47 U.S.C. § 254(h)(3).

prohibition,¹⁷ but nowhere in the record do Petitioners or their supporters propose safeguards to ensure that E-rate services are not resold or transferred.¹⁸

The Associations also noted that both Petitions fail to account for how they would comply with numerous statutory obligations under the Children’s Internet Protection Act (“CIPA”) which specifically mandates that filtering technology be functional and operational “during any use of such computers by minors.”¹⁹ The Petitions fail to answer critical implementation questions, for example, how would USAC ensure CIPA compliance in purely residential settings? Additionally, what authority permits school districts to mandate filtering technology on personal computing devices in private residences? Furthermore, would not the disabling of protection measures – possibly by parents – render schools non-CIPA compliant and therefore in violation of the Act? The Associations urged that these are critical compliance questions that cannot be swept away by bald assertions that the schools will comply with CIPA obligations.

Waiving critical accountability rules – *i.e.*, the E-rate cost allocation rules and the “educational purposes” requirement – would prevent the Commission from determining whether Petitioners’ proposals are truly “no cost” as many commenters assert and could potentially destabilize the E-rate fund. No commenters have presented any compelling safeguard against over-provisioning to ensure that schools do not seek more E-rate funding than is necessary for educational purposes. As the Commission recognized in the *Alaska Order*, there is no way for USAC or the Commission to efficiently prevent over-provisioning if off-campus use is not measured.²⁰ The Associations highlighted evidence in the record that multiple supporters of the Petitions have

¹⁷ See *Alaska Order* at ¶ 17 (imposing the condition that excess services be made available to all capable service providers in a neutral manner that does not require or take into account any commitments or promises from service providers to “ensure that excess services are not transferred in exchange for any benefit to the school, library, or surrounding community, whether the benefit is a promise of particular services, prices, or other thing of value.”); see also *Sixth E-rate Report and Order* at ¶ 26 (prohibiting schools from charging for the community use of services and facilities purchased using E-rate funds).

¹⁸ In fact, Boulder Valley has publicly acknowledged its desire to monetize its E-rate supported fiber network. See, Letter from Don Orr, Assistant Superintendent of Operations, to Bruce Messinger, Ph.D., Superintendent, *Current BVSD/City of Boulder joint initiatives*, p. 4 (July 2, 2014), available at: [http://www.boarddocs.com/co/bvsd/Board.nsf/files/9LW2UC687ED1/\\$file/City%20of%20Boulder%20Partnerships%20%207.9.pdf](http://www.boarddocs.com/co/bvsd/Board.nsf/files/9LW2UC687ED1/$file/City%20of%20Boulder%20Partnerships%20%207.9.pdf) (visited Dec. 20, 2016) (referring to BVSD’s fiber network as “a significant asset . . . that can be monetized”).

¹⁹ 47 U.S.C. § 254(h)(5)(B). See also, *USTelecom Comments*, pp. 11 – 14; *USTelecom Reply Comments*, pp. 8 – 10.

²⁰ *Alaska Order* at ¶ 14. See also, *E-rate Deployed Ubiquitously 2011 Pilot Program*, WC Docket No. 10-222, Order, 26 FCC Rcd 9526, ¶ 13 (WCB 2011) (“*EDU2011 Pilot Program Order*”) (requiring analysis of per-student cost of off-premises connectivity including usage and difficulties ensuring that the wireless devices were “used only for educational purposes”). Cf. Reply Comments of Boulder Valley School District, WC Docket Nos. 13-184, 10-90, CC Docket No. 02-6, p. 10 (submitted Dec. 5, 2016) (asserting that “students who will potentially use an E-rate supported network will always use less than the capacity for which the network was designed” and that “there is essentially no possibility that there will be any increased demand on the network relative to the school day”).

already noted that they will file similar waiver requests if the Petitions are granted.²¹ When added together, elimination of critical accountability rules in the E-rate program²² would result in a petri dish of the waste, fraud, and abuse that the Commission has fought so hard to eliminate in this program.²³

The Associations also distinguished Petitioners' requests from the circumstances present in the *Alaska Order* relied upon by Petitioners as precedent to support grant of the Petitions by the Bureau, noting that a near-total lack of Internet access via a local dial-up or toll-free connection served as justification for granting the State of Alaska's waiver.²⁴ Moreover, the State of Alaska recognized the likelihood for off-campus use to result in the need for additional services and the Commission ultimately required schools and libraries to document the necessity for additional services requested through the E-rate program to enable efficient assessment of whether additional requests are associated with educational purposes.²⁵ Furthermore, the *Alaska Order* required Alaska to obtain contractual commitments from service providers to limit off-campus use to non-operating hours,²⁶ while the Petitioners plainly concede that off-campus use could likely take place during school hours.²⁷

²¹ See e.g., Comments of the New York City Department of Education, WC Docket Nos. 13-184, 10-90, CC Docket No. 02-6, p. 2 (submitted Nov. 3, 2016); Comments of Miami-Dade County Public Schools, WC Docket Nos. 13-184, 10-90, CC Docket No. 02-6, p. 1 (submitted Nov. 3, 2016); see also, Comments of Detroit Public Schools, WC Docket Nos. 13-184, 10-90, CC Docket No. 02-6, p. 1 (submitted Oct. 21, 2016); Comments of Steamboat Springs School District RE-2, WC Docket Nos. 13-184, 10-90, CC Docket No. 02-6, p. 1 (submitted Nov. 2, 2016).

²² See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, ¶¶ 34, 570-77 (1997) (“*Universal Service First Report and Order*”) (finding that Congress intended to require accountability on the part of schools and libraries and mandating that E-rate recipients certify compliance with the “educational purposes” requirement and others under penalty of perjury); see also, *Alaska Order* at ¶ 8 (noting that certification requirements serve the critical purpose of supporting the Commission's efforts to guard against fraud, waste, and abuse).

²³ In light of the contortion of the statutory scheme and highly increased potential for waste, fraud and abuse that would accompany grant of the Petitions, the Associations expressed that, in order to avoid these undesirable outcomes, there is no reason the petitioners cannot cost allocate the ineligible components of their proposals, and use their creative forces to come up with funding partnerships to cover the ineligible costs.

²⁴ *Alaska Order* at ¶ 11.

²⁵ *Id.* at ¶ 14. Petitioners merely allege that over-provisioning is not a threat because school networks will not normally be in use after school hours. However, schools are still permitted to allow community use of their on-campus E-rate services in addition to the potential for substantial demand on the network in the evenings when networks are most in demand.

²⁶ *Id.* at ¶ 16 (requiring Internet service providers to demonstrate the effectiveness of restricting service to designated non-operating hours).

²⁷ See Reply Comments of Microsoft Corp., WC Docket Nos. 13-184, 10-90, CC Docket No. 02-6, n.16 (submitted Dec. 5, 2016) (stating that “[d]aytime usage at home by students . . . would not necessitate an increase in a school's peak capacity needs because these students' daytime usage would already be accounted for in regular capacity planning.”); see also, Boulder Valley Petition at i, n. 1 (noting that “a

Finally, based on the precedent and information discussed the Associations urged the Bureau to deny the Petitions outright. However, if the Bureau does not do so, the Associations noted that any proposal to grant the instant Petitions must be considered by the full Commission because the Petitions present “novel questions of law, fact or policy which cannot be resolved under outstanding precedents and guidelines.”²⁸ As discussed above, the Petitions contemplate use of E-rate supported services and facilities that are simply without precedent in the two decade history of the E-rate program. Microsoft recognizes in its Petition the “uncertainty about the Commission’s E-rate rules” and states that much of the uncertainty springs from the “novelty of the [TV White Space] technology,” further recognizing that the Eligible Services List “simply does not contemplate this scenario.”²⁹

Pursuant to Section 1.1206 of the Commission’s rules, a copy of this letter is being filed via ECFS.

Sincerely,

/s/ Patricia Cave
Patricia Cave
Director, Government Affairs

Cc (via email): Nick Degani
Aaron Garza
Kate Dumouchel
Ikenna Ofobike
Ryan Palmer
Madeleine Findley
Amy Bender
Derrick Owens
Mike Jacobs
Kevin Rupy

student who is absent due to illness or any other reason, would still have access to the network while at home during the day”).

²⁸ 47 C.F.R. § 0.291(a)(2).

²⁹ *Charlotte/Halifax Petition* at 15-17.