

Before the
Federal Communications Commission
Washington, DC 20554

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

ORDER

Adopted: December 15, 2010

Released: December 15, 2010

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we address questions received by the Bureau regarding the Commission’s ruling on the eligibility of basic maintenance and the newly codified E-rate program gift rules. Pursuant to the Bureau’s delegated authority to “issue orders interpreting [the Commission’s] rules as necessary” concerning the E-rate program, we address the questions by topic below.

II. DISCUSSION

A. Basic Maintenance

2. In the Sixth Report and Order, the Commission sought to reduce the inefficient use of E-rate funds by clarifying that certain services are ineligible for funding beginning in funding year 2011.

1 Schools and Libraries Universal Service Support Mechanism and A National Broadband Plan for Our Future, Sixth Report and Order, CC Docket 02-6, FCC 10-175 at paras. 87-90, 106-107 (rel. Sept. 28, 2010) (Sixth Report and Order); see also 75 Fed. Reg. 75393. Some of the questions were received through filings submitted to the Commission or Bureau staff or verbally at the trainings conducted by the Universal Service Administrative Company (USAC). See, e.g., Ex Parte Letter from Melissa E. Newman, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (dated Dec. 2, 2010); Letter from Charles Keller, Counsel to Cisco, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (dated Oct. 25, 2010) (Cisco Ex Parte); Letter from Mary L. Henze, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (dated Dec. 6, 2010); Letter from USAC, to Federal Communications Commission, CC Docket No. 02-6 (dated Dec. 2, 2010); Letter from Gary Rawson, Chair of State E-rate Coordinators Alliance, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (dated Dec. 13, 2010); Letter from Ryan W. King, Patton Boggs, to Rebekah L. Bina, Attorney, Federal Communications Commission, CC Docket No. 02-6 (dated Dec. 13, 2010).

2 Federal-State Joint Board on Universal Service, Third Report and Order, CC Docket 96-45, 12 FCC Rcd 22485, 22488-89, para. 6 (1997).

3 Sixth Report and Order at paras. 102-109.

The Commission explained that requests for basic maintenance of internal connections (BMIC) will continue to be funded for actual work performed.⁴ Subsequent to releasing the *Sixth Report and Order*, we received a number of questions about the scope and implementation of the Commission's decision on reimbursement for BMIC.

3. As explained in the *Sixth Report and Order*, the Commission seeks comment every year on the proposed list of services and products that are eligible for E-rate funding and uses several criteria to determine whether to include a service in the Eligible Services List (ESL) for the E-rate program.⁵ Although the Commission had sought comment on, among other options, whether it should cease funding for BMIC for funding year 2011, it ultimately decided to retain BMIC as an eligible priority 2 service for the upcoming funding year.⁶ In the *Sixth Report and Order*, the Commission explained that “[r]equests for basic maintenance will continue to be funded as internal connections if, but for the maintenance at issue, the service would not function and serve its intended purpose with the degree of reliability ordinarily provided in the marketplace to entities receiving such service.”⁷

4. In order to avoid the potential waste of E-rate resources, however, the Commission concluded that reimbursements for BMIC will be paid only for actual work performed or for hours of labor actually used.⁸ The Commission required applicants and service providers to submit invoices to the Universal Service Administrative Company (USAC) for physical work actually performed, as opposed to invoicing in advance for estimated work that in some circumstances may never be performed. Moreover, the Commission stated that work invoices should be based on a reasonable hourly rate or flat fee for the type of service performed and that this process will ensure that E-rate funds will be used only when actual services are provided.⁹

5. We clarify that fixed price BMIC contracts will continue to be eligible for funding, but only for work that is actually performed under the contract. The Commission's ruling does *not* limit contracts eligible for funding to those that pay service providers on a time and materials basis. For example, if a service provider offers a flat fee for all maintenance and repairs necessary for the upcoming year for specific pieces of equipment, the applicant may apply for E-rate funds for estimated repairs, and funds will be released when repairs or other maintenance is performed and invoices for the actual repairs are submitted to USAC.¹⁰ As work is performed, invoices may be submitted to USAC on a periodic basis during the funding year. We note that USAC, as part of its regular reviews to ensure that funding is being properly disbursed, may request information from applicants or service providers in order to verify the

⁴ *Id.* at paras. 106-107.

⁵ *Id.* at paras. 93-99.

⁶ *Id.* at para 107; see also *Schools and Libraries Universal Service Support Mechanism, A National Broadband Plan for Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Notice of Proposed Rulemaking, 25 FCC Rcd 6872, 6905-6906, para. 80 (2010).

⁷ *Sixth Report and Order* at para 107.

⁸ *Id.* at para 107.

⁹ *Id.* at para. 108.

¹⁰ An applicant may not invoice the cost of the maintenance contract if no work was performed under the contract. Similarly, this rule may not be circumvented by invoicing a single repair at a rate for the entire price of the fixed maintenance contract. As noted herein, work invoices should be based on a reasonable rate for the type of service performed. If, however, \$20,000 worth of BMIC was performed under the contract due to repairs or maintenance that needed to be made utilizing the standard set forth above, the applicant may submit invoices that total the estimated repair costs of \$20,000.

accuracy of the amounts invoiced.¹¹ We emphasize that applicants should reasonably estimate their anticipated expenses. For example, it is not reasonable to estimate an amount that would cover the cost of every piece of eligible equipment. Instead, the estimated amount must be based on verifiable or historical data, such as previous years' expenses related to maintenance, the cost of previous or current maintenance contracts, and the age of the equipment at issue. If a request for funding seems excessive, especially as compared to requests from previous years, for example, USAC may request additional information from the applicant to support its estimate. We note that an applicant that grossly or knowingly submits a request for funding that is far in excess of its needs will violate the Commission's requirement that applicants make a *bona fide* request for funding.¹²

6. We further clarify that reimbursement is permitted for some other types of BMIC without an applicant having to demonstrate that work was performed. Services such as software upgrades and patches, including bug fixes and security patches, and online and telephone-based technical assistance and tools that are typically standard fixed priced offerings will continue to be funded as BMIC if the service or equipment would not function and serve its intended purpose with the degree of reliability ordinarily provided but for these specific services.¹³ In many cases the costs and frequency of these types of services may be difficult to predict or quantify, so we clarify that reimbursement for these repairs will be permitted without demonstration of work performed, as a matter of administrative convenience. Therefore, applicants will be allowed to seek reimbursement of a one-time charge for these services at any time during the funding year. We explicitly distinguish these types of services from the physical maintenance and repair of equipment, such as the labor and parts needed to repair equipment at the school or library, which, as set forth in paragraph 107 of the *Sixth Report and Order* and clarified above, requires that work be performed before reimbursement can occur.

7. We note that the Commission is committed to eliminating waste, fraud and abuse in the E-rate program. As the Commission made clear in its *Sixth Report and Order*, it will continue to consider other additional changes to the E-rate program to further improve and modernize the program in future funding years.¹⁴

B. Gifts

8. In the *Sixth Report and Order*, the Commission amended section 54.503 of the Commission's E-rate program rules and adopted gift rules consistent with the gift rules applicable to federal agencies.¹⁵ The Bureau has received several inquiries regarding these rules, which fall primarily into four main categories: charitable donations, conferences and training sessions, representation on state

¹¹ See USAC: Invoice Deadlines and Extension Requests, at <http://www.usac.org/sl/applicants/step11/invoice-deadlines-extension-requests.aspx> (last visited Dec. 7, 2010).

¹² 47 U.S.C. § 245(h)(1)(B); See also *Request for Review by Ysleta Independent School District of the Decision of the Universal Service Administrator*, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26407, 26409 at para. 5 (2003), citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9076 (1997) at para. 570. It is also unfair to other schools and libraries for applicants to seek commitments that exceed their needs, given that demand for E-rate funding always exceeds the amount of funding available.

¹³ We clarify here that standard fixed-priced offerings that provide only software downloads, security patches, bug fixes, and access to online and/or telephone-based technical assistance and tools are not unbundled warranties if they are required to support the functionality of the internal connection.

¹⁴ *Sixth Report and Order* at para. 7.

¹⁵ *Sixth Report and Order* at paras. 87-90, Appendix A, 47 C.F.R. § 54.503(d) as amended.

boards, and timing concerns. Each of these categories is separately addressed below. We have also received questions about the extent to which state or federal agencies that participate in the E-rate program are subject to the gift rules. We note that under our rules, if such entities participate in the E-Rate program (for example, preparing applications or participating in the competitive bidding process for contracts, including state master contracts) such agencies and their employees will be subject to the gift rules in the same manner as any other applicant or service provider, depending upon the capacity in which the agency is acting.¹⁶

9. As an initial matter, the Commission stated in the *Sixth Report and Order* that the newly codified E-rate program gift rules are intended to be consistent with the gift rules applicable to federal agencies.¹⁷ The order explained that the federal rules offer a fair balance between prohibiting gifts that might have undue or improper influence on a procurement decision and acknowledging the realities of professional interactions, which might occasionally involve giving modest refreshments or a token gift.¹⁸ As such, it referred parties to the federal rules and their interpretations as guidance to respond to questions on specific gift offerings.¹⁹ We find that these illustrative examples straightforwardly address many of the questions we have received from E-rate participants, and thus may be instructive on how the Commission might interpret similar situations involving gifts in the E-rate program context; including guidance on the disposal of gifts that an E-rate program participant believes might violate the Commission's rule.²⁰ However, as it is ultimately this agency's responsibility to interpret its rules, we emphasize that the Commission is responsible for determining whether there has been a violation of its E-rate gift rules.

10. *Charitable Donations.* As stated in the *Sixth Report and Order*, the gift rule is not intended to discourage charitable donations to E-rate eligible entities as long as those donations are not directly or indirectly related to E-rate procurement activities or decisions and provided the donation is not given with the intention of circumventing the competitive bidding or other E-rate program rules.²¹ For example, cash donations or donations in the form of electronic equipment, such as laptops, cell phones, or computers, and sporting, musical, or playground equipment may be permissible if they can be said to benefit the school, school district, or library as a whole and broadly serve an educational purpose.²² Furthermore, a paid-for exchange of services at market rates, such as the purchase of advertising space on school or library premises, typically will be deemed neither a gift nor a charitable contribution, provided that such a purchase was not made for the purpose of influencing the competitive bidding process.

¹⁶ *Sixth Report and Order* at para. 90; Appendix A, 47 C.F.R. § 54.503(d) as amended.

¹⁷ *Sixth Report and Order* at paras. 88-89.

¹⁸ *Sixth Report and Order* at para. 89.

¹⁹ *Sixth Report and Order* at para. 89. See generally PART 2635 Standards of Ethical Conduct for Employees of the Executive Branch, subpart B -- Gifts from Outside Sources, 5 C.F.R. § 2635.201-205.

²⁰ See 5 C.F.R. § 2635.205 (Proper Disposition of prohibited gifts).

²¹ *Sixth Report and Order* at para. 90; Appendix A, 47 C.F.R. § 54.503(d) as amended.

²² *Sixth Report and Order* at para. 90 (identifying specific literacy programs, scholarships, and capital improvements). For example, the Commission did not intend to prohibit programs that are unrelated to the provision of E-rate supported services or such long-standing programs like Cable in the Classroom (CIC), which is a public service effort supported by national cable networks and local cable companies that provides free cable connections and commercial-free educational programming to schools across the country. See *Cable in the Classroom*, <http://www.ciconline.org/AboutUs> (last visited Dec. 3, 2010).

11. However, applicants should keep in mind that even if a charitable donation furthers educational programs and purposes, it will violate the E-rate program gift rule if it is provided for the specific purpose of influencing the E-rate competitive bidding process.²³ We provide specific examples of situations where the donation is likely given for the specific purpose of influencing the competitive process. For instance, gifts of equipment that increase the demand for a donor's services, and thus cause a school, school district or library to purchase more E-rate services from the donor, are prohibited because the underlying purpose of such gifts is likely not "charitable" but rather to influence the purchasing patterns of the recipient school or library under the E-rate program.²⁴ Similarly, service providers cannot offer special equipment discounts or equipment with service arrangements to E-rate recipients that are not currently available to some other class of subscribers or segment of the public.²⁵ We also note that the Commission's E-rate rules require applicants to pay the non-discount share of the E-rate services they receive.²⁶ As such, a gift associated with the purchase of E-rate services may effectively decrease the amount the applicant is otherwise required to pay for their E-rate services.²⁷ Thus, charitable donations are prohibited to the extent they function as inducements to make purchases from the donor in violation of competitive bidding requirements, reduce the applicant's share of the payment for its services, or might otherwise serve to increase the demand for an existing donor's services.

12. We presumptively prohibit as indicative of undue influence certain gifts like cash, travel, and equipment provided for the benefit of a specific individual or discrete group of individuals associated with or employed by an E-rate participant.²⁸ For example, a service provider may not give a gift to a teacher who helps draft a district's technology plan, even if that teacher does not ultimately help select the E-rate service provider. Further, such a gift to an individual would not be covered by the charitable donation exception.²⁹

13. *Conference, Seminars and Training Sessions.* The *Sixth Report and Order* identifies certain allowable *de minimis* gifts.³⁰ For example, modest refreshments, items with little intrinsic value

²³ Such gift could be provided directly to the applicant from the service provider or it could be provided indirectly through, for example, a third-party non-profit or foundation.

²⁴ For example, it would be a presumptive violation if a service provider donated computers to a school and the use of those computers had the effect of increasing the school's volume of Internet access services purchased from that service provider and for which E-rate discounts were sought.

²⁵ For example, many cell phones are free or available to the general public at a discounted price with the purchase of a two-year service contract. Schools and libraries are free to take advantage of these deals, without cost-allocation, but cannot accept other equipment with service arrangements that are not otherwise available to some segment of the public or class of users. Therefore, a service provider may not offer free iPads to a school with the purchase of telecommunications or Internet access services eligible under E-rate, if such an arrangement is not currently available to the public or a designated class of subscribers.

²⁶ See 47 C.F.R. § 54.505.

²⁷ See USAC: Free Services Advisory, at <http://www.usac.org/sl/applicants/step06/free-services-advisory.aspx> (last visited Dec. 8, 2010) ("An applicant may not receive free or discounted services from a service provider that have the effect of providing a discount level to the applicant greater than the discount allowed for Schools and Libraries support").

²⁸ *Sixth Report and Order* at para. 90; Appendix A, 47 C.F.R. § 54.503(d) as amended; see generally 5 C.F.R. §§ 2635.202, 203(f).

²⁹ See 5 C.F.R. § 2635.203(f) (defining a gift that is solicited or accepted indirectly).

³⁰ *Sixth Report and Order* at para. 88.

intended solely for presentation, and items that are worth \$20 or less, as long as those items do not exceed \$50 per employee from any one source per funding year, are permissible gifts.³¹ Accordingly, raffle tickets, raffle gifts and door prizes provided at industry events must have a retail value under \$20,³² unless the raffle is open to the public.³³ Additionally, the federal gift rules identify other exceptions to the gift rules for personal relationships, discounts,³⁴ honors, and outside business relationships and provide detailed examples of the limitations on gifts associated with sponsorship of industry events, speaking engagements, and other widely attended gatherings.³⁵ These rules and examples generally reflect the intention and spirit of the newly codified E-rate gift rules and can be considered good guidance for how the Commission might interpret gift actions related to widely attended gatherings including conferences, seminars, and training sessions attended by E-rate program participants. Note that a widely attended gathering does not simply mean an event with a large number of attendees.³⁶ A training or conference regarding one vendor's services or a few vendors' services would not be a widely attended event even if many people attended. A widely attended event would be, for example, a trade show featuring presentations, demonstrations or information by multiple vendors. Therefore, we clarify that service provider sponsorship of an E-rate related conference, seminar or training session is permissible when the involved parties otherwise adhere to the E-rate program gift rules.³⁷ Likewise, food, refreshments, instruction and documents furnished to all attendees during the widely attended conference, seminar, or

³¹ *Id.* at para. 88.

³² The cost of a gift should be determined by its retail value and not the wholesale value. *See* 5 C.F.R. § 2635.203(c) (definition of Market Value). *See also* 5 C.F.R. § 2635.203(a)(5) (“Gift...does not include...[r]ewards and prizes given to competitors in contests or events, including random drawings, open to the public unless the employee’s entry into the contest or event is required as part of his official duties”).

³³ Open to the public means that attendance to the event is free of charge and that members of the public at large typically attend such a gathering. For example, a conference that is designed for government agency IT directors or for school or library employees involved in developing the technology needs for their school or library would not be viewed as “open to the public.”

³⁴ “Discounts” in this context does not mean the “discounts” that are statutorily required by the E-rate program.

³⁵ *See generally*, 5 C.F.R. § 2635.204 (Exceptions).

³⁶ *See generally*, 5 C.F.R. § 2635.204 (Exceptions). *See also, e.g.*, 5 C.F.R. § 2635.204(g),(h)(widely attended gatherings are defined as follows:

A gathering is widely attended if it is expected that a large number of persons will attend and that persons with a diversity of views or interests will be present, for example, if it is open to members from throughout the interested industry of profession or if those in attendance represent a range of persons interested in a given matter.

The federal rules further state that a determination must be made that the employee’s attendance at the gathering is in the interest of the agency because it will further agency programs and operations.);

Advisory Opinion Regarding Widely Attended Gatherings, 07x14 (Dec. 5, 2007), *available at* http://www.usoge.gov/ethics_guidance/opinions/advop_files/2007/07x14.html (last visited Dec. 7, 2010); Ethics Guidance, Advisory Opinions and DAEOgrams, <http://www.usoge.gov> (last visited Dec. 7, 2010) (providing guidance on federal gift rules).

³⁷ We note that training sessions may be treated differently dependant upon the host and purpose of the training session. For example, E-rate trainings sponsored, organized or conducted by a state, regional or local governmental body, such as a department of education; by applicants or a group of applicants; or by a non-profit or trade association that includes those entities, such as the American Library Association or the Gates Foundation will not be considered “vendor promotional training” for the purposes of the E-rate gift rules. *See also* 5 C.F.R. §202(c)(5), 2635.203(g) (vendor promotional training).

training sessions are permissible. However, as identified in the federal rules, travel expenses, lodging, meals and entertainment collateral to the event would be considered inappropriate gifts.³⁸ Service providers, therefore, can sponsor, organize or conduct trainings, including E-rate trainings; they cannot provide any gift that exceeds the amounts detailed in the *Sixth Report and Order*.

14. We further clarify, however, that under the E-rate program gift rules, a service provider cannot solicit the attendance, or pay the attendance fee, of an employee of an E-rate school, school district, or library to speak at a service provider's conference, seminar, panel, training session, or other event when the primary purpose of the speaker's attendance is to promote and discuss the benefits of using the service provider's E-rate services. Additionally, the employee cannot accept free attendance at such an event even if the school or library has assigned the employee to participate or present information on behalf of the school or library. We find there is no E-rate program or public interest furthered by allowing an E-rate service provider to pay an E-rate applicant representative to promote the service provider's E-rate products. However, a service provider may offer an "educational discount" on the attendance fee to employees of schools or libraries for widely attended gatherings if that discount is available to all employees of schools or libraries.

15. *Representation on Boards.* We have been advised that sometimes employees of schools are required by law to sit on the governing boards of other governmental agencies that may act as E-rate service providers and are provided meals, lodging, airfare and other travel-related expenses as part of their board duties.³⁹ We clarify such travel expenses are not gifts that violate E-rate program rules when provided to a state or regional education board member by the board in effectuation of that member's official position and duties on the board. We also clarify that an individual associated with or employed by an E-rate service provider may sit on a school or library's fundraising board without violating the Commission's competitive bidding rules, provided that the individual's service on the board does not unfairly influence the competitive bidding process or provide the service provider with inside knowledge of the applicant's E-rate program that would undermine the competitive bidding process. We understand that some state agencies or subdivisions apply for E-rate funding on behalf of member schools or libraries. We note that if those agencies or subdivisions become service providers, that agency or subdivision cannot provide assistance to their members or clients related to the competitive bidding process for the services for which they will submit bids. That assistance is not a gift, but it would be a violation of the Commission's competitive bidding rules, unless the agency or subdivision has properly established a firewall separating those individuals involved in submitting the bid from those providing assistance.⁴⁰

16. *Timing.* As stated in the *Sixth Report and Order*, the newly codified E-rate program gift rules take effect 30 days after publication of the order in the Federal Register.⁴¹ The *Sixth Report and Order*, including Appendix A, was published on December 3, 2010.⁴² Additionally, if an applicant or

³⁸ See 5 C.F.R. § 2635.204(g)(4). Collateral to the event means that the item of value is not provided during the actual event or outside the event room or rooms. For example, a meal eaten at a restaurant in the same hotel where the event is held but that is not provided by the event would be considered collateral to the event, even if it occurs during the same time that the event is conducted.

³⁹ See Ohio E-rate Consortium Ex Parte.

⁴⁰ See 47 C.F.R. § 54.503; see also <http://www.usac.org/sl/applicants/step01/esa-guidelines/>.

⁴¹ *Sixth Report and Order* at para. 118.

⁴² See *Schools and Libraries Universal Service Support Mechanism and A National Broadband Plan for Our Future*, Sixth Report and Order, 75 Fed. Reg. 75393 (Dec. 3, 2010).

eligible entity is seeking E-rate funds for the first time or is, for the first time, seeking E-rate funds for a new category of service, the applicant or entity must be in compliance with the Commission's gift rules beginning at least six months prior to the posting date of its Form 470.⁴³ We remind all program participants that the Commission has long held that the competitive bidding process must be fair and open.⁴⁴

III. ORDERING CLAUSES

17. ACCORDINGLY, IT IS ORDERED, that pursuant to the authority contained in sections 1 through 4, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 254, 303(r), and 403, this order IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Sharon Gillett
Chief
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⁴³ For example, a school that has not previously participated in the E-rate program has decided to apply for E-rate support for FY2012. If that school posts its Form 470 on November 1, 2011, it must be in compliance with the Commission's E-rate gift rules beginning at least six months prior to the 470 posting, or May 1, 2011.

⁴⁴ See *Request for Review by Ysleta Independent School District of the Decision of the Universal Service Administrator*, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26407 (2003); *Sixth Report and Order* at paras 85, 87; see also FCC Form 470 certification (requiring applicant to certify that it has not received anything of value or been promised anything of value other than the service and equipment on the form).