

BRIEF FOR THE RESPONDENTS

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 12-60070  
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JOSEPH M. HILL, TRUSTEE IN BANKRUPTCY FOR  
LAKEHILLS CONSULTING, L.P.,

PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION  
AND THE UNITED STATES OF AMERICA,

RESPONDENTS

\_\_\_\_\_  
ON PETITION FOR REVIEW OF AN ORDER OF  
THE FEDERAL COMMUNICATIONS COMMISSION  
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## **STATEMENT REGARDING ORAL ARGUMENT**

Respondents believe that issues presented in the case are straightforward and that the government's position is sufficiently set forth in the briefs and the order on review. Nonetheless, respondents would welcome the opportunity to present oral argument if the Court determines that it would be of assistance.

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BRIEF FOR THE RESPONDENTS

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**JURISDICTIONAL STATEMENT**

The Federal Communications Commission (“FCC” or “Commission”) released the Order under review on November 28, 2011. *Request for Review of Decisions of the Universal Service Administrator by Joseph M. Hill, Trustee in Bankruptcy for Lakehills Consulting LP*, 26 FCC Rcd 1656 (released November 28, 2011) (Petitioner’s Record Excerpts (“R.E.”) Tab 1). Joseph M. Hill, the Trustee in Bankruptcy for Lakehills Consulting, L.P. (“Lakehills”), filed a timely petition for review on January 27, 2012, within the 60-day deadline established by

28 U.S.C. § 2344. This Court has jurisdiction to review the Commission's decision under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

### **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Whether, after finding numerous, undisputed violations of the Commission's competitive bidding rules, the Commission lawfully approved the rescission of federal funding of contracts awarded to Lakehills's predecessor under a government program that provides subsidized communications services to schools and libraries.

2. Whether the Commission acted within its discretion in denying, as inconsistent with the public interest, Lakehills's request to waive the agency's rules requiring recovery of federal funds disbursed in violation of the Commission's competitive bidding rules.

### **STATEMENT OF THE CASE**

This case involves Lakehills's claims to federal funds under an FCC program that provides discounted communications services to schools and libraries. Under this program, known as the E-rate program, eligible schools and libraries can apply for subsidies, or "discounts," for eligible communications services. If the applications are approved and after compliance with the relevant regulations, the eligible school or library applicant can receive funding to cover a

large portion of the cost due under contracts with service providers for the eligible services.

On March 29, 2011, the Universal Service Administrative Company (“USAC”), which administers the E-rate program under the supervision of the FCC, rescinded E-rate program funding committed to the Houston Independent School District (“the Houston ISD”) for funding years 2002, 2003, and 2004. USAC found that the Houston ISD, and a consortium of providers of communications equipment and related services had failed to conduct a fair and open competitive bidding process when awarding contracts for E-rate services. One of the implicated providers was Analytical Computer Services (“ACS”), a company whose assets and liabilities Lakehills subsequently acquired.

USAC explained that it was required by law to recover any E-rate funds improperly disbursed pursuant to these contracts. Lakehills appealed USAC’s decision to the FCC, arguing that USAC was not required to recoup the tainted E-rate funds, notwithstanding the violations of the FCC’s competitive bidding rules, which were undisputed. In the alternative, Lakehills sought a waiver of the rule requiring that funds be withheld and recovered. On November 28, 2011, the Commission denied Lakehills’s request for review, affirmed USAC’s decision to rescind funding, and denied Lakehills’s waiver request. Lakehills has appealed the

Commission's order denying its request for administrative review and/or waiver to this Court.

## **COUNTERSTATEMENT OF THE FACTS**

### **I. Statutory and Regulatory Background**

The availability of reasonably priced telecommunications services in all parts of the nation, known as “universal service,” is a longstanding goal of federal telecommunications law. *See* 47 U.S.C. § 151 (directing the Commission “to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges.”).

In 1996, Congress amended the Communications Act to, among other things, add a new Section 254 to the Act. *See* Pub. L. No. 104-104, § 254, 110 Stat. 56, 71 (1996) (codified at 47 U.S.C. § 254). As relevant here, that provision expanded the scope of universal service by creating programs to provide discounted telecommunications services and other communications services to schools, libraries, and rural health care providers. *See* 47 U.S.C. § 254(h). Congress thus sought to insure that elementary and secondary schools and libraries would have affordable access to modern communications services. H.R. Conf. Rep. No. 104-458, at 17 *reprinted in* 1996 USCCAN 124, 133 (1996).

The Commission's Universal Service Schools and Libraries Support Mechanism, or "E-rate" program, is financed by the Universal Service Fund – a federal fund to which all providers of interstate telecommunications services are required to contribute. *See* 47 U.S.C. § 254(d); 47 C.F.R. § 54.706. These providers are permitted to, and almost always do, pass along to their end-user customers the cost of their Universal Service Fund contributions. *See Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000). Thus, like other subsidy programs under the Universal Service Fund, the E-rate program is indirectly funded by almost every user of interstate telecommunications services in the United States.

With respect to schools and libraries, Congress directed the Commission to "establish competitively neutral rules . . . to enhance, to the extent technically feasible and economically reasonable, access to advanced communications and information services for all public and non-profit elementary and secondary school classrooms, health care providers, and libraries." 47 U.S.C. § 254(h)(2)(A). The E-rate program, established pursuant to this directive, implements universal service support for the nation's schools and libraries by allowing eligible schools, libraries and consortia to apply for discounts for eligible telecommunications services, Internet access, and internal connections, such as communications links between different schools in an eligible school district. 47 C.F.R. §§ 54.500-54.523. Since

the inception of the E-rate program, the Commission has required, as a matter of “fiscal responsibility,” that “eligible schools and libraries seek competitive bids for all services eligible for section 254(h) discounts.” *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9029 ¶ 480 (1997), *aff’d in part*, *Texas Office of Public Util. Counsel v. FCC*, 1183 F.3d 393 (5th Cir. 1999). As the Commission explained in 1997, “[c]ompetitive bidding is the most efficient means for ensuring that eligible schools and libraries are informed about all of the choices available to them.” *Id.* Moreover, “[a]bsent competitive bidding, prices charged to schools and libraries may be needlessly high,” and “fewer eligible schools and libraries would be able to participate in the program or the demand on universal service support mechanisms would be needlessly great.” *Id.* In particular, the amount available each year under the E-rate program is capped at \$2.25 billion, adjusted for inflation. 12 FCC Rcd at ¶ 529; 47 C.F.R. § 54.507.

To promote a competitive, fair and open bidding process, the Commission adopted a number of “competitive bidding requirements,” in addition to those imposed by state and local law. These requirements ensure that all prospective bidders can identify the services sought and prepare timely bids. *See* 47 C.F.R.

§ 54.504(a)(2001).<sup>1</sup> Emphasizing that “the competitive bidding process is a key component of the schools and library program,” the FCC has explained that requiring recovery of funds for violations of the competitive bidding rules ensures that universal service funds “support services that satisfy the precise needs of an applicant and that services are provided at the lowest possible rates.” *Id.*; *In the Matter of Schools and Libraries Universal Service Support Mechanism*, 19 FCC Rcd 15808, 15814 ¶ 21 (2004) (“*Fifth Report and Order*”).

First, applicants seeking eligible services under the E-rate program must submit, for posting on USAC’s website, a FCC Form 470 requesting discounts for the requested services under a new contract. 47 C.F.R. § 54.504(b). After submitting the FCC Form 470, the applicant must wait 28 days before making commitments with the selected service provider. 47 C.F.R. § 54.504(b)(4).

The Commission’s rules require the applicant to carefully consider all bids it receives prior to entering into an agreement with the service provider. 47 C.F.R. § 54.511(a). “[U]pon signing a contract for eligible services,” an eligible school, library or consortium must submit a completed FCC Form 471 to notify USAC that services have been requested from a specified service provider. 47 C.F.R. §

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<sup>1</sup> Citations to the provisions of the Code of Federal Regulations addressing the E-rate program requirements are to the version of the regulations in effect at the time of the events at issue in this litigation. A copy of the versions of these regulations that were in effect during the relevant time period are contained in the Statutory and Regulatory Addendum to this brief.

54.504(c). The commitment of universal service support is “contingent upon” the filing of the Form 471. *Id.*

To insure the integrity of the E-rate program, the Commission adopted a number of requirements designed to recover E-rate funds committed in violation of the rules governing the program. Since the early years of the program, the Commission has made clear that any E-rate funds that are committed in violation of the governing statute must be recovered. *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, Order, 17 Comm. Reg. 1192 (FCC 99-291) (1999) (“*Commitment Adjustment Order*”). In 2004, in the *Fifth Report and Order*, the Commission further strengthened the integrity of the E-rate program to protect it from waste, fraud, and abuse. There, the Commission recognized that, in addition to its obligation to recover funds “disbursed in violation of the statute,” it has an obligation to recover funds disbursed in violation of “a rule that implements the statute or a substantive program goal.” *Fifth Report and Order*, 19 FCC Rcd at 15814 ¶ 18. The Commission explained that it “should recover the full amount disbursed for any funding requests in which the beneficiary failed to comply with the Commission’s competitive bidding requirements set forth in section 54.504 and 54.511 [and] related Commission orders.” *Id.* at ¶ 21. For example, the agency specified that it is “appropriate to recover the full amount of [the] funds disbursed



for a funding request when the beneficiary signs a contract before the end of the 28-day posting period,” or “where the beneficiary failed to consider price as the primary fact when evaluating among competing bids.” *Id.*

## **II. Prior Proceedings.**

This case arises out of the Houston ISD’s selection of Lakehills’s predecessor ACS, a reseller of computer equipment and provider of installation and maintenance services, to supply communications equipment and related services pertaining to commitments made for E-rate funding between 2002 and 2004.

On January 12, 2007, Lakehills acquired ACS, including all of ACS’s contracts, employees, and liabilities. R.E. Tab 1, ¶ 8. Four days earlier, an article published in the *Houston Chronicle* raised serious concerns about the Houston ISD’s choice of ACS.<sup>2</sup> The article reported that ACS’s partner Micro Systems Engineering (“MSE”), a co-signatory (with ACS) on bidding proposals for E-rate services to the Houston ISD, was the subject of a federal investigation into possible corruption and fraud arising out of its provision of services to the Dallas Independent School District (“Dallas ISD”). *Id.* The article also reported ACS’s allegations that computer manufacturer Hewlett Packard (“HP”) had severed its

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<sup>2</sup> See “School Board Weighs Ties to Vendor,” *Houston Chronicle* (Jan. 8, 2007) available at <http://www.chron.com/disp/story.mpl/metropolitan/4453657.html> (copy attached R.E. Tab 2).

reseller relationship with ACS because of concerns about violations of HP's ethics rules prohibiting bribery and kickbacks.

On March 19, 2007, USAC formally requested that ACS "address in detail and in writing" the issues raised in the *Houston Chronicle* article to permit USAC "to evaluate whether ACS has complied fully with program rules and whether USAC should seek recovery of funds or take other appropriate action." R.E. Tab 3, p. 2. In response, the president of ACS, Frank Trifilio, denied any wrongdoing, and stated that HP did not offer a specific reason for severing its relationship with ACS. R.E. Tab 1, ¶ 9. On May 22, 2007, MSE's president, Frankie Wong, was indicted on 11 federal criminal counts, including bribery concerning E-rate funding for contracts with the Dallas ISD. *See United States v. Bohuchot*, 2008 WL 4849324 (N.D. Tex. 2008).<sup>3</sup>

In a September 27, 2007 letter, USAC informed Lakehills it was withholding payments for E-rate services that Lakehills provided to the Houston ISD "to protect the integrity of the Universal Service Fund . . . from possible waste, fraud and abuse." R.E. Tab 4, p. 1. USAC explained that it was taking this action based on its understanding that MSE had co-signed bid proposals with ACS, and that MSE's president, Mr. Wong, had been indicted on charges relating to MSE's

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<sup>3</sup> A guilty verdict was returned on all counts on July 10, 2008, and Mr. Wong's conviction was affirmed by this Court in November of 2010. *United States v. Bohuchot*, 625 F.3d 892 (5th Cir. 2010).

contracts with the Dallas ISD. *Id.* USAC further noted its understanding that ACS's president, Mr. Trifilio, is or was the president of a company that "is alleged to have played a role in the money laundering charges in [the] indictment." *Id.* USAC asked ACS to explain its relationship with Mr. Wong and with that company, Acclaim Professional Services ("Acclaim"). *Id.* at 5. On November 27, 2007, after considering Lakehills's response, USAC informed Lakehills that, to "protect the integrity of the Universal Service Fund from possible waste fraud and abuse," it would continue to withhold funding based on the "close and pervasive ties" between Lakehills and ACS, MSE and Acclaim, and the indictment earlier that year of MSE's president. R.E. Tab 5, at 1-2.

In June 2009, Lakehills filed a petition for liquidation under Chapter 7 of the Bankruptcy Code, claiming as assets the E-rate funds withheld by USAC. The United States has filed a proof of claim for \$225,182,370, representing the sum of the ACS contracts, trebled pursuant to the False Claims Act. R.E. Tab 1, ¶ 11. Lakehills filed an objection to this claim, and litigation over the objection has been stayed pending the outcome of this appeal.

In March, 2010, the Houston ISD entered into a settlement agreement with the United States Department of Justice to resolve an investigation into its non-competitive bidding practices insofar as they may have resulted in the submission of false claims for payment in violation of the False Claims Act. R.E. Tab 1, ¶ 12.

As part of the settlement, the Houston ISD paid \$850,000 to the United States, and relinquished its right to funding requests it made in funding years 2002-2004. *Id.* at ¶ 12 & n. 73.

### **III. The Administrative Decisions**

#### **A. USAC's Funding Rescission**

On March 29, 2011, USAC rescinded funding commitments it had made to the Houston ISD for funding years 2002-2004, and sought to recover all funds committed to ACS arising out of the Houston ISD contract awards. R.E. Tab 6. In a 23-page decision, USAC explained that it had found multiple violations of the E-rate competitive bidding rules during the relevant period.

For funding year 2002, USAC determined that the Houston ISD did not have signed contracts in place at the time it submitted its Form 471, in plain violation of the requirement that Form 471 be submitted “upon signing” such contracts. R.E. Tab 6, p. 4 & n.19. Based on contemporaneous e-mails and other evidence, USAC also found that the Houston ISD “had predetermined that HP, Lakehills, ACS, and MSE would continue to be [its] vendors prior to the completion of the Funding Year 2002 competitive bidding process.” *Id.* at p. 5. Finally, USAC found that the Houston ISD employees “accepted meals, gifts, and other gratuities from vendors” – including MSE and ASC – who were seeking contract awards from the district. *Id.* at p. 6. *See id.* at pp. 6-8 (detailing the purchase of cigars and

numerous meals during 2002). USAC concluded that because the Houston ISD “violated the FCC’s competitive bidding rules and local procurement laws,” and because it did not appear that the Houston ISD “had contracts in place . . . at the time it filed its Form 471 for Funding Year 2002,” it was “required to rescind the funding commitments” and “recover any improperly disbursed funds.” *Id.* at p. 9.

For funding year 2003, USAC determined that the Houston ISD had violated the requirement that Form 470 must be submitted for posting on USAC’s website at least 28 days before the award of any E-rate contract: the district had declared ACS and MSE the bid winners on December 20, 2002 even though it had submitted its Form 470 only four days earlier. *Id.* at pp. 9-10. USAC also found evidence (as with funding year 2002) that the Houston ISD had “pre-determined that it would continue to use HP, ACS, and MSE as its vendors,” and these companies provided Houston ISD employees with “many . . . meals, trips, and other gratuities.” *Id.* at p. 11. *See also id.* at pp. 11-14 (describing provision of numerous meals, including some in Las Vegas, Astros baseball tickets, and an outing at a billiards parlor). USAC concluded that these violations of “the FCC’s competitive bidding rules and its policies,” as well as the violation of “the mandatory 28-day competitive bidding period,” required it to rescind the funding commitments and recover the improperly disbursed funds for funding year 2003. *Id.* at pp. 15-16.

For funding year 2004, USAC again determined that employees of the Houston ISD had accepted numerous meals, trips and gratuities from HP, ACS and MSE and Acclaim, including tickets to the Super Bowl and a \$60,000 loan. *See* R.E. Tab 6, pp. 17-20. USAC again emphasized that the acceptance of such gratuities violated E-rate program rules “regarding fair and open competitive bidding and the avoidance of improper relationships between E-Rate program applicants and their service providers,” as well as the Houston ISD’s own policies. *Id.* at p. 20. “Because [the Houston ISD] violated the FCC’s competitive bidding rules and its policies,” USAC concluded that, for funding year 2004 as well, it was “required to rescind the funding commitments . . . and recover any improperly disbursed funds.” *Id.* at p. 21.

Finally, USAC concluded that because the competitive bidding violations “tainted” the underlying contracts, it was prohibited by Commission rules from disbursing the funds “irrespective of the assignment of the contracts to Lakehills.” *Id.* at p. 22. “The fact that [the Houston ISD] and ACS assigned these contracts to Lakehills or that Lakehills may have performed work pursuant to these contracts does not cure the underlying competitive bidding violations that occurred at the time [the Houston ISD] awarded these contracts” to the consortium including ACS. *Id.* at p. 23.

## **B. The Commission's Affirmance.**

Lakehills filed an administrative appeal from USAC's decision, which the Commission denied. R.E. Tab 1. The Commission first held that "USAC correctly determined that Houston ISD, ACS/Lakehills, MSE and Acclaim violated the Commission's competitive bidding rules for funding years 2002, 2003, and 2004." R.E. Tab 1, ¶ 20. Among other things, the Commission found that the Houston ISD filed its Form 471 for funding year 2002 before it had signed contracts for services, and that it had "selected ACS within four days of posting its FCC Form 470 for FY 2003." *Id.* The Commission also found the "record . . . replete with examples demonstrating Houston ISD selected" ACS and other E-rate service providers "prior to the conclusion of the competitive bidding process," and that the school district "tailored its process to reflect the services and products offered by," *inter alia*, ACS and MSE. *Id.* The agency also emphasized that, as the evidence before USAC showed, Houston ISD personnel "met with and accepted extensive gifts from ACS" and the other vendors, such as "meals, tickets to sporting events," – including access to "ACS's suite for the Super Bowl," – "monetary loans, . . . and trips to Las Vegas, Nevada, and Seattle, Washington." *Id.*

The Commission explained that the practices engaged in by the Houston ISD and its vendors "suppress fair and open competitive bidding" and "ultimately damage the integrity of the E-rate program." *Id.* at ¶ 21. The Commission

underscored that “[t]he Universal Service Fund is a limited resource, and applicants and service providers who acquire funds by violating our rules reduce the amount available for compliant applicants.” *Id.* Because the Houston ISD “conducted a bidding process that was not fair and open and selected ACS in violation of the competitive bidding rules,” the Commission concluded that “[u]niversal service funding should not have been distributed to ACS, nor to any successor of ACS, including Lakehills.” *Id.*

The Commission rejected Lakehills’s contention that the Commission cannot recover funds for violations of its rules, rather than violations of a statute, noting that, like statutes, duly enacted agency regulations have the “force and effect of law.” *Id.* at ¶ 22 (citations omitted). The Commission also rejected the assertion that the amount of the government’s recovery should be offset by the “value” of the services provided by Lakehills to the Houston ISD. *Id.* at ¶ 25. The Commission explained that “whether the work was performed is not relevant to whether there was a violation of the competitive bidding rules,” *id.*, and that in any event, “Lakehills provided no services to the United States”; instead, “the value of any goods or services provided by Lakehills benefited Houston ISD, not the United States.” *Id.* at ¶ 26.

Finally, the Commission held that a waiver of its recoupment rules was unwarranted. The Commission explained that it will waive its rules “only if



special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.” *Id.* at ¶ 30. Under that standard, the Commission observed, it had not found waivers appropriate where a “contract is signed more than a few days prior to the expiration of the 28-day [waiting] period,” or where “there has not been a fair and open competitive bidding process.” *Id.* (citing cases). Moreover, the Commission explained, it could not find the public interest to be served “when there is evidence of waste, fraud and abuse in the record.” *Id.* In this case, the Commission found, “the activities engaged in by Houston ISD, and ACS and its partners, substantially undermined Houston ISD’s competitive bidding process,” and the public interest therefore “does not support Lakehills retaining funding obtained in violation of Commission rules under ACS’s tainted contracts.” *Id.*

The Commission also rejected Lakehills’s contention that a waiver of the recoupment requirement was justified on the theory that USAC should have informed Lakehills before September 2007 of the then-pending government investigations of suspected bidding-process irregularities and other misconduct regarding the provision of E-rate services to the Houston ISD. The Commission explained that “[w]ell before Lakehills performed the work at issue – as early as 2005 – entities financing its work appear likely to have known of the potential irregularities with some of the consortium vendors (such as MSE) and the

investigation into wrongdoing involving the Dallas ISD, providing reason to suspect that USAC was likely to hold or deny funding for applications involving MSE not just in Dallas but in Houston ISD as well.” *Id.*

This appeal followed.

### **SUMMARY OF THE ARGUMENT**

The Commission properly concluded – and Lakehills does not dispute – that for funding years 2002-2004, Lakehills’s E-rate contracts with the Houston ISD were awarded without conducting a fair and open competitive bidding process and in violation of the Commission’s competitive bidding rules. Among other things, the evidence showed, the Houston ISD selected its vendors prior to the conclusion of the competitive bidding process, and the Houston ISD employees accepted from vendors (including Lakehills’s predecessor, ACS) numerous gifts, meals, trips and event tickets. As a result of these violations, the Commission properly affirmed USAC’s decision to rescind the contracts, and appropriately denied Lakehills’s request to waive its rule requiring recovery of improperly committed funds.

1. The Commission correctly rejected Lakehills’s contention that the Commission lacks power to recover funds committed and disbursed as a result of contracts awarded in violation of a rule implementing a statute, rather than the underlying statute itself. Congress vested the Commission with authority to promulgate rules to implement the E-rate program, and such duly promulgated

rules, like statutes, have the force and effect of law. Limiting the agency to enforcement of statutory requirements alone would disserve the goals of the E-rate program because it would remove an important protection against the violation of regulatory requirements (including competitive bidding requirements) that are intended to preserve the integrity of the Universal Service Fund, simply because the requirements are not embodied expressly in a statute.

2. Lakehills's argument that, in rescinding funding, the Commission failed to give consideration to the principles governing universal service in the Communications Act is procedurally barred because Lakehills did not present it to the Commission. *See* 47 U.S.C. § 405(a). In any event, the argument fails to further Lakehills's cause. Recovering funds committed or disbursed in violation of the competitive bidding rules advances the purposes of the E-rate program by promoting adherence to rules that protect the integrity of the program and ensure that E-rate services are provided at reasonable rates and in the public interest.

3. Lastly, the Commission did not abuse its broad discretion in denying Lakehills's request for waiver of the recovery rule. As the Commission properly determined, the public interest would not be served by waiving the rule under the facts of this case, where there was substantial evidence that the E-rate contracts were awarded without conducting the requisite competitive bidding process. The fact that Lakehills's provided services under its contract with the Houston ISD is

irrelevant to the Commission's finding that the contracts were obtained in violation of Commission rules. Nor was the Commission compelled to waive recovery for funds relating to Lakehills's work in 2007. USAC's March 2007 grant of Lakehills's request for a consolidated identification number for financial accounting purposes could not reasonably have given rise to any reliance interest on Lakehills's part. As for the interests of Lakehills's creditors, the Commission properly found that they had reason to be on notice as early as 2005 that problems might arise with Lakehills's USAC funding.

### **STANDARD OF REVIEW**

Under the Administrative Procedure Act ("APA"), the Commission's decision must be upheld unless it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not accordance with law." 5 U.S.C. § 706(2)(A). "[T]he ultimate standard of review is a narrow one," and the "court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Review is limited to whether the agency articulated a rational connection between the facts found and the decision made; the Court's "mandate is not to weigh the evidence pro and con." *City of Arlington v. FCC*, 668 F.3d 229, 260 (5th Cir. 2012) (citations and quotation marks omitted). This standard is "even more deferential" when a court is reviewing an agency's

application and interpretation of its own regulations. *Citizens for Fair Utility Regulation v. U.S. Nuclear Regulatory Comm’n*, 898 F.2d 51, 54 (5th Cir. 1990).

In addition, a party challenging an agency decision declining to grant an exemption from a generally applicable rule bears a very heavy burden. *People of the State of New York v. FCC*, 267 F.3d 91, 107 (2d Cir. 2001). “[R]eview of an agency's denial of a waiver” may result in reversal “only when ‘the agency’s reasons are so insubstantial as to render that denial an abuse of discretion.’ ” *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1181-82 (D.C. Cir. 2003) (quoting *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 517 (D.C. Cir. 1999)).

## **ARGUMENT**

### **I. THE COMMISSION PROPERLY UPHELD USAC’S RESCISSION OF LAKEHILLS’S FUNDING.**

Lakehills does not dispute that, in funding years 2002-2004, the E-rate contracts to Lakehills’s predecessor, ACS, were awarded in violation of the Commission’s competitive bidding rules.

*First*, in Funding Year 2002, the Houston ISD filed its Form 471 before it had signed contracts for services, in direct violation of the Commission’s rule requiring the submission of Form 471 only “upon signing a contract for eligible services.” R.E. Tab 1, ¶ 20 & n. 120. *See* 47 C.F.R. § 54.504(c)(2001) .

*Second*, the Houston ISD selected ACS in Funding Year 2003 “within four days of posting its FCC Form 470,” in plain violation of Commission rules “requiring applicants to wait 28 days prior to making a selection.” *Id.*, § 54.504(b).

*Third*, in all three funding years, the “Houston ISD met with and accepted extensive gifts from ACS, HP, MSE, and Acclaim,” including meals, tickets to sporting events, loans, and trips to Las Vegas and Seattle. *Id.* See R.E. Tab 6, pp. 6-8, 11-14, 17-20.

Thus, the Commission correctly held that the “Houston ISD conducted a bidding process that was not fair and open and selected ACS in violation of the competitive bidding rules.” R.E. Tab 1, ¶ 21.

**A. The Commission Reasonably Determined That Funding Commitments Resulting From Contracts Awarded In Violation Of The Agency’s Competitive Bidding Rules Should Be Rescinded And The Disbursed Funds Recovered.**

The Commission properly upheld USAC’s decision to rescind the funding commitments to Lakehills and to initiate recovery of previously committed funding for the 2002-2004 period. R.E. Tab 1, ¶¶ 22-24. As the Commission explained, the Supreme Court has affirmed the government’s power to “recover funds which have been wrongfully, erroneously, or illegally paid,” whether the illegality stems from a violation of a statutory or regulatory requirement. *Id.* at ¶ 22. It is well settled that duly promulgated regulations, like properly enacted statutes, have the

“force and effect of law.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) (citations omitted); *Brown v. United States*, 227 F.3d 295, 298 (5th Cir. 2000); *United States v. Harvey*, 659 F.2d 62, 64 (5th Cir. 1981).

Thus, in *Schweiker v. Hansen*, 450 U.S. 785 (1981), the Supreme Court held that failure to comply with an agency rule prohibited the expenditure of public funds. In that case, the issue was whether Social Security benefits could be paid when the claimant failed to comply with an agency regulation requiring a written application before such benefits could be disbursed. After noting that the “requisite manner of application” had been delegated to the agency, the Court held that it was “no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits.” 450 U.S. at 790.

Likewise, in *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380 (1947), the claimant was refused recovery for its lost crop on a federally backed insurance policy, because the claimant failed to comply with the policy’s terms and conditions incorporating agency regulations. The Court explained that the scope of the government’s authority “may be explicitly defined by Congress” or “be limited by delegated legislation, properly exercised through the rule-making power.” 332 U.S. at 384.

This Court has applied the teachings of *Schweiker* and *Merrill* to preclude a payment by the United States when regulations promulgated pursuant to a variety of statutory benefit programs have been violated. *See, e.g., Wright v. Allstate Ins. Co.*, 415 F.3d 384, 387 (5th Cir. 2005) (National Flood Insurance Act regulation requiring filing of proof of loss); *Jones v. Dept. of Health & Human Servs.*, 843 F.3d 851, 854 (5th Cir. 1988) (Social Security regulation requiring a written application for benefits); *R&R Farm Enters. v. Federal Crop Ins. Corp.*, 788 F.2d 1148, 1154 (5th Cir. 1986) (Federal Crop Insurance regulation requiring loss to be caused by peril insured against); *Hicks v. Harris*, 606 F.2d 65, 66-67 (5th Cir. 1979) (Higher Education Act regulation prohibiting insurance payout where loan disbursements are made prior to the issuance of insurance). Consistent with that precedent against federal expenditure where governing rules have been violated, the Commission has long made clear that it will “recover the full amount disbursed for any funding requests in which the beneficiary failed to comply with the Commission’s competitive bidding requirements.” *Fifth Report and Order*, 19 FCC Rcd at 15815, ¶ 21.

Contrary to Lakehills’s suggestion (Pet. Br. 19), the Supreme Court’s decision in *OPM v. Richmond*, 496 U.S. 414 (1990), does not limit the Commission to recovering *only* those government funds paid out in violation of a statutory requirement, but not an agency regulation. To be sure, the *Richmond*



Court rejected a claim to benefits in excess of a “statutory eligibility limit.” *See* 496 U.S. at 418. But the decision nowhere suggests that the government’s power to recover unlawfully disbursed funds is limited to those paid out in violation of a statutory requirement. Indeed, in reaching its holding, the Court in *Richmond* expressly noted its prior decision in *Schweiker v. Hansen*, which (as discussed above) involved the preclusive effect of agency rules. *See Richmond*, 496 U.S. at 429. Thus, as the Federal Circuit has explained, “[w]hile *Richmond* addressed a statutory limitation,” the opinion’s citation of *Hansen* in support of its holding demonstrates that “statutory and regulatory requirements concerning payment of money from the Treasury [are] equally binding.” *Doe v. United States*, 372 F.3d 1347, 1356 (Fed. Cir. 2004).<sup>4</sup>

Lakehills’s proposed distinction between statutory and rule violations not only misconstrues Supreme Court precedent, but also makes no sense as a practical matter. As the Commission explained in the order under review, the FCC’s competitive bidding rules “ensure that the [universal service] fund supports services that satisfy the needs of an institution at the lowest possible price.” R.E. Tab 1, ¶ 23. *See also Fifth Report and Order*, ¶ 21. It would undermine the

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<sup>4</sup> Lakehills’s contention that the Commission’s decision to seek recovery for violation of the competitive bidding rules was “based solely” on a “misinterpretation” of *Richmond* (Pet. Br. 18) is belied by the terms of the order under review, which, among other authorities, expressly relies on *Schweiker*. *See* R.E. Tab 1, ¶ 23.

integrity of the E-rate program if applicants and service providers could retain funds received in violation of the Commission’s rules, simply because the funding conditions – duly promulgated under delegated authority, *see* 47 U.S.C.

§ 254(h)(2)(A); *see also id.* § 154(i) – are contained in agency rules rather than statutory provisions. Indeed, such an approach would permit service providers to violate regulations governing eligibility for federal funds so long as those rules do not merely parrot the authorizing statute. “Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law.” *Richmond*, 496 U.S. at 426 (quoting *Heckler v. Community Health Services of Crawford*, 467 U.S. 51, 63 (1984)).

In sum, because agency rules, like statutes, have the “force and effect of law,” *Chrysler Corp.*, 441 U.S. at 295, the Commission was correct in concluding that the multiple and undisputed violations of the agency’s competitive bidding rules required full recovery of the improperly committed E-rate funds in this case.

### **B. The Recovery Rule Advances Universal Service Principles.**

Lakehills also contends that the Commission “failed to give proper consideration and weight to the Universal Service Principles” set forth in Section 254(b) of the Communications Act. Pet. Br. 20.

At the outset, Lakehills’s contention is barred by Section 405 of the Communications Act, which requires that “a party must afford the Commission an

opportunity to pass on the arguments the party presents for judicial review.”

*Comsat Corp. v. FCC*, 250 F.3d 931, 937 (5th Cir. 2001). *See* 47 U.S.C. § 405(a) (specifying that a petition for reconsideration is “a condition precedent to judicial review” of an FCC order if “the party seeking review . . . relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass.”). In this case, Lakehills never argued to the Commission, as it now does on appeal, that rescinding the funding commitments and seeking to recover disbursements would fail to give proper consideration and weight to the statute’s universal service principles. *Compare* Pet. Br. 20 *with* R.E. Tab 7 (Lakehills’s Request for Review). The argument is therefore foreclosed in this Court.

In any event, the argument fails on the merits because the FCC’s recovery rule is entirely consistent with Congress’s stated goals for universal service. Among other things, ensuring that wrongfully disbursed funds are recovered promotes the provision of quality universal services at reasonable rates, *see* 47 U.S.C. § 254(b)(1), and thereby serves to encourage access to advanced telecommunications services, by elementary and secondary schools and libraries,

*id.* § 254(b)(6).<sup>5</sup> As the Commission has explained, because “applicants and service providers who acquire funds by violating [the competitive bidding] rules reduce the amount available for compliant applicants,” R.E. Tab 1, ¶ 21; 47 C.F.R. § 54.507, recovery of funds is essential to preserving the integrity of the E-rate program and protecting federal funds from waste, fraud, and abuse. *Fifth Report and Order*, ¶ 21. Because the competitive bidding rules are designed to ensure that services are provided to the government at competitive rates, violations of those rules carry the risk of inflated prices. The recovery rule therefore also advances the statutory principle that quality services should be available at reasonable rates. See *Alenco Communications v. FCC*, 201 F.3d at 620-21 (“[t]he agency’s broad discretion to provide sufficient universal service funding includes the decision to

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<sup>5</sup> Lakehills also contends (Pet. Br. 22) that the Commission’s decision to recover funds disregards 47 U.S.C. § 254(b)(7), which provides that the Commission shall base universal service policies on “[s]uch other principles” as it determines “are necessary and appropriate for the protection of the public interest, convenience and necessity and are consistent with this Act.” By its terms, however, section 254(b)(7) governs the Commission’s authority to adopt *additional* universal service principles. See *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1099 (D.C. Cir. 2009). It is not an independent constraint on the Commission’s power to advance the principles that are already embodied in the Act.

impose cost controls to avoid excessive expenditures that will detract from universal service”).<sup>6</sup>

Lakehills argues that a rule that “mandates **automatic** withdrawal of all funding for the violation of any rule, without further assessment of factors such as what party primarily was responsible for the violation and whether the intended beneficiary received the intended benefit, does not serve the public interest.” Pet. Br. 23. But the Commission does not mandate “automatic” withdrawal of funding for a violation of “any rule.” Recovery is mandated only for amounts disbursed in violation of a rule, such as the competitive bidding rules, that implements a “substantive program goal.” *See Fifth Report and Order*, ¶¶ 20-21. And even then, the Commission has made clear that it “retains the discretion to depart from [the] general standards” governing recovery “when application would be contrary to the public interest.” *Id.* at ¶ 18 & n.38. As explained below, the Commission reasonably found that no such departure from the general rule was justified on the facts of this case.

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<sup>6</sup> Thus, Lakehills is wrong in asserting that there was “no allegation or evidence to suggest that Houston ISD or USAC overpaid or would become obligated to overpay for the services provided.” Pet. Br. 22-23. The violation of the competitive bidding rules removed an important protection intended to ensure that the services are provided “at the lowest possible price.” R.E. Tab 1, at ¶ 23.

## **II. THE COMMISSION REASONABLY DENIED LAKEHILLS'S REQUEST FOR A WAIVER OF THE RECOVERY RULE.**

The Commission may waive any provision of its rules on a showing of good cause. 47 C.F.R. § 1.3. A waiver is appropriate, however, “only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.” *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). Because an applicant for waiver “must plead with particularity the facts and circumstances which warrant such action,” it “faces a high hurdle even at the starting gate.” *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

### **A. Lakehills Failed To Demonstrate That A Waiver Would Be In The Public Interest.**

As the Commission explained, while it has waived its universal service rules where, for example, “applicants have committed *minor errors* in filling out their applications,” it “has not found waiver appropriate in instances where, for example, [a] contract is signed more than a few days prior to the expiration of the

28-day [waiting] period, or where there has not been a fair and open competitive bidding process.” R.E. Tab 1, ¶ 30 (emphasis added).<sup>7</sup>

Here, Lakehills does not contend that the undisputed violations of the competitive bidding rules in this case are attributable to any “errors,” much less “minor errors.” For instance, ACS was selected as the Houston ISD’s funding year 2003 vendor within “four days” (not the 28 days required) of its submission of Form 470, R.E. Tab 1, ¶ 20 – hardly a minimal departure from the rule. Nor does Lakehills contest the Commission’s determination that the ACS contract awards for all three funding years were tainted by improper contacts between the Houston ISD and its vendors, as well as the provision of numerous prohibited meals and gratuities, all of which led the Commission to conclude that the “bidding process” that led to ACS’s selection “was not fair and open.” *Id.* The Commission properly determined that the public interest would not be “served by waiving [its] rules when there is evidence of waste, fraud and abuse in the record,” and “does not

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<sup>7</sup> The Commission distinguished *Request for Review of a Decision of the Universal Service Administrator by Albert Lea Area Schools*, Order, 24 FCC Rcd 4533 (WCB 2009), where the agency’s Wireline Competition Bureau waived the Commission’s filing and waiting period rules where the applicants’ errors were merely “clerical,” *id.* at 4537 ¶ 5, or where applicants missed the waiting period deadline by a “minimal number of days (*i.e.* one to three days) and therefore their requests for discounted services were subject to competitive bidding for a meaningful period of time,” *id.* at 4539 ¶ 9. R.E. Tab 1, ¶ 30 n. 174.

support Lakehills retaining funding obtained in violation of Commission rules under ACS's tainted contracts." *Id.* at ¶ 30.

Lakehills contends that the Commission, in evaluating its request for a waiver, was obligated to consider the value of the services Lakehills and ACS provided to the Houston ISD. Pet. Br. 26. But as the Commission explained, the fact that "the work was performed is not relevant to whether there was a violation of the competitive bidding rules." R.E. Tab 1, ¶ 25. The public interest in enforcing a free and open competitive bidding process to promote low-cost, high-quality, E-rate services remains undiminished even if the services provided without fair competition are performed.

Under Lakehills's theory, recovery of federal funds due to violations of the competitive bidding rules would be permitted only to the extent that the service provider failed to perform on its contract. But if recovery is limited to non-performance issues, recoupment could not be used to deter *other* conduct in violation of the competitive bidding rules, such as bid-rigging. Nor would the rule requiring recovery of improperly disbursed funds perform any meaningful purpose, as recovery of federal funds is required in any event when a service provider fails to perform as required by a government program.

Contrary to Lakehills's suggestion that the Commission "disregarded" the value of its services (Pet. Br. 26), the Commission explained that the "value of any



goods or services provided by Lakehills benefited Houston ISD,” and that any “intangible benefits” to the United States, whose E-rate funds are at issue here, “are speculative at best.” *Id.* at ¶ 26. *See United States v. Rogan*, 517 F.3d 449, 453 (7th Cir. 2008) (noting in context of Medicaid funding that, regardless of whether or not medical services were provided to the patients, the defendant “did not furnish any medical service *to the United States.*”) (emphasis added). In some sense, of course, any federal subsidy program is intended broadly to promote the federal goals underlying the subsidy. But under Lakehills’s argument (see Pet. Br. 26-29), performance under the subsidy invariably would offset the government’s right to recover misspent funds. As explained above, neither law nor logic requires that result and would render the competitive bidding rules meaningless.

Lakehills’s contention (Pet. Br. 23) that enforcement of the recovery rule will diminish the incentive of investors to finance E-rate projects is unavailing, for several reasons. As an initial matter, as the Commission noted, such enforcement would have no effect on “access to E-rate funds for companies that comply with the program requirements.” R.E. Tab 1, ¶ 30. Furthermore, that there may be situations where the rule must be enforced is simply a risk (like many others) that lenders are expected to take into account when deciding whether to extend

financing.<sup>8</sup> Indeed, logic suggests that rules ensuring fair competition are likely to promote investment; by contrast, a flawed bidding process is likely to lead to an uncertain environment for lenders. Finally, as the Commission found, the entities financing Lakehills's work had reason to know "as early as 2005" of the widely reported concerns about the conduct of the members of Lakehills's consortium, (particularly MSE), as well as the investigation into the wrongdoing involving the Dallas ISD. *See* R.E. Tab 1, ¶ 30 & n.259 (citing several 2005 media reports of the Dallas ISD investigation and USAC's freeze of E-rate payments).

**B. Events In 2007 Do Not Weigh in Favor Of Granting A Waiver To Lakehills.**

Lakehills further contends that the Commission should have engaged in a "separate balancing of the equities" for "service provided by Lakehills during 2007." Pet. Br. 30. Specifically, Lakehills complains that on March 9, 2007 "USAC took the affirmative act" of approving Lakehills's request to have ACS's "service provider identification numbers" (SPINs) consolidated into Lakehills's SPIN, and that "[h]aving received its consolidated SPIN, Lakehills took on new E-rate work." Pet. Br. 31. USAC's grant of a consolidated SPIN – at Lakehills's own request – was an accounting procedure to facilitate the tracking and

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<sup>8</sup> Lakehills's grounds for a waiver are not enhanced because the funds sought will be paid by its Trustee in Bankruptcy to Lakehills's creditors (Pet. Br. 32), because any rights those lenders may have are derived from their relationship with Lakehills.

disbursement of universal service funds under the contracts to which Lakehills succeeded. No service provider reasonably could have interpreted that ministerial action as an assurance or guaranty of payment for services ultimately determined to have been provided or disbursed in violation of the Commission's competitive bidding rules – particularly where the Commission had made clear since 2004 its “intent ‘to recover the full amount disbursed for any funding requests in which the beneficiary failed to comply with the Commission’s competitive bidding requirements.’” R.E. Tab 1, ¶ 4, quoting *Fifth Report and Order*, ¶ 21. Nor is there merit in Lakehills’s complaint that “USAC did nothing to dissuade Lakehills from taking new work” during this time period. Pet. Br. 31. Lakehills itself acknowledges that the FCC was under no obligation to inform it of the details of an ongoing (and nonpublic) law enforcement investigation, *id.* at 31 n.17. *See* R.E. Tab 1, ¶ 29.

In any event, as the Commission explained, Lakehills can hardly claim unfair surprise. Media coverage of the irregularities and their relationship to the Houston ISD contracts broke as early as January of 2007, when the *Houston Chronicle* reported that the president of Lakehills’s predecessor (ACS) had testified in the criminal investigation of its co-bidder MSE (whose president was indicted in May 2007), and its reseller relationship with HP was terminated under a cloud of suspected ethics violations. R.E. Tab 1, ¶¶ 9-10; R.E. Tab 2. Under

these circumstances, Lakehills proceeded to provide further services in May 2007 at its own peril.

\* \* \* \* \*

In sum, Lakehills has failed to meet its heavy burden of showing that the Commission abused its discretion in denying a waiver of its recovery rule in the face of the Commission's undisputed determination that Lakehills and its predecessor, ACS, obtained E-rate contracts with the Houston ISD in violation of the agency's competitive bidding rules.

### CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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MAY 21, 2012

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

JOSEPH M. HILL, TRUSTEE IN BANKRUPTCY FOR )  
LAKEHILLS CONSULTING, L.P. )

PETITIONER )

v. )

FEDERAL COMMUNICATIONS COMMISSION )  
AND THE UNITED STATES OF AMERICA )

RESPONDENTS )

No. 12-60070

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify  
that the accompanying “Brief for Respondents” in the captioned case contains  
8071 words.

/s/ HILLARY B. BURCHUK  
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MAY 21, 2012

# ADDENDUM

47 U.S.C. § 254

47 C.F.R. § 54.504(2001)

47 C.F.R. § 54.504(2002)

47 C.F.R. § 54.504(2003)

47 C.F.R. § 54.504(2004)

47 C.F.R. § 54.511(2001)

47 C.F.R. § 54.511(2002)

47 C.F.R. § 54.511(2003)

47 C.F.R. § 54.511(2004)

**UNITED STATES CODE ANNOTATED**  
**TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS**  
**CHAPTER 5. WIRE OR RADIO COMMUNICATION**  
**SUBCHAPTER II. COMMON CARRIERS**  
**PART II. DEVELOPMENT OF COMPETITIVE MARKETS**

**§ 254. Universal service**

(a) Procedures to review universal service requirements

(1) Federal-State Joint Board on universal service

Within one month after February 8, 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c) of this title a proceeding to recommend changes to any of its regulations in order to implement sections 214(e) of this title and this section, including the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under section 410(c) of this title, one member of such Joint Board shall be a State-appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after February 8, 1996.

(2) Commission action

The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after February 8, 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) Quality and rates

Quality services should be available at just, reasonable, and affordable rates.

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h) of this section.

(7) Additional principles

Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

(c) Definition



(1) In general

Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services--

(A) are essential to education, public health, or public safety;

(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

(C) are being deployed in public telecommunications networks by telecommunications carriers; and

(D) are consistent with the public interest, convenience, and necessity.

(2) Alterations and modifications

The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.

(3) Special services

In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h) of this section.

(d) Telecommunications carrier contribution

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

(e) Universal service support

After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

(f) State authority

A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

(g) Interexchange and interstate services

Within 6 months after February 8, 1996, the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.

(h) Telecommunications services for certain providers

(1) In general

(A) Health care providers for rural areas

A telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State. A

telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any, between the rates for services provided to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service.

(B) Educational providers and libraries

All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3) of this section, 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. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall--

(i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or

(ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

(2) Advanced services

The Commission shall establish competitively neutral rules--

(A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries; and

(B) to define the circumstances under which a telecommunications carrier may be required to connect its network to such public institutional telecommunications users.

(3) Terms and conditions

Telecommunications services and network capacity provided to a public institutional telecommunications user under this subsection may not be sold, resold, or otherwise transferred by such user in consideration for money or any other thing of value.

(4) Eligibility of users

No entity listed in this subsection shall be entitled to preferential rates or treatment as required by this subsection, if such entity operates as a for-profit business, is a school described in paragraph (7)(A) with an endowment of more than \$50,000,000, or is a library or library consortium not eligible for assistance from a State library administrative agency under the Library Services and Technology Act [20 U.S.C.A. § 9121 et seq.].

(5) Requirements for certain schools with computers having internet access

(A) Internet safety

(i) In general

Except as provided in clause (ii), an elementary or secondary school having computers with Internet access may not receive services at discount rates under paragraph (1)(B) unless the school, school board, local educational agency, or other authority with responsibility for administration of the school--

**(I)** submits to the Commission the certifications described in subparagraphs (B) and (C);

**(II)** submits to the Commission a certification that an Internet safety policy has been adopted and implemented for the school under subsection (1) of this section; and

**(III)** ensures the use of such computers in accordance with the certifications.

(ii) Applicability

The prohibition in clause (i) shall not apply with respect to a school that receives services at discount rates under paragraph (1)(B) only for purposes other than the provision of Internet access, Internet service, or internal connections.

(iii) Public notice; hearing

An elementary or secondary school described in clause (i), or the school board, local educational agency, or other authority with responsibility for administration of the school, shall provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy. In the case of an elementary or secondary school other than an elementary

or secondary school as defined in section 8801 of Title 20, the notice and hearing required by this clause may be limited to those members of the public with a relationship to the school.

(B) Certification with respect to minors

A certification under this subparagraph is a certification that the school, school board, local educational agency, or other authority with responsibility for administration of the school--

(i) is enforcing a policy of Internet safety for minors that includes monitoring the online activities of minors and the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--

(I) obscene;

(II) child pornography; or

(III) harmful to minors;

(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors; and

(iii) as part of its Internet safety policy is educating minors about appropriate online behavior, including interacting with other individuals on social networking websites and in chat rooms and cyberbullying awareness and response.

(C) Certification with respect to adults

A certification under this paragraph is a certification that the school, school board, local educational agency, or other authority with responsibility for administration of the school--

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--

(I) obscene; or

(II) child pornography; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers.

(D) Disabling during adult use

An administrator, supervisor, or other person authorized by the certifying authority under subparagraph (A)(i) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.

(E) Timing of implementation

(i) In general

Subject to clause (ii) in the case of any school covered by this paragraph as of the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certification under subparagraphs (B) and (C) shall be made--

(I) with respect to the first program funding year under this subsection following such effective date, not later than 120 days after the beginning of such program funding year; and

(II) with respect to any subsequent program funding year, as part of the application process for such program funding year.

(ii) Process

(I) Schools with internet safety policy and technology protection measures in place

A school covered by clause (i) that has in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C) shall certify its compliance with subparagraphs (B) and (C) during each annual program application cycle under this subsection, except that with respect to the first program funding year after the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certifications shall be made not later than 120 days after the beginning of such first program funding year.

(II) Schools without internet safety policy and technology protection measures in place

A school covered by clause (i) that does not have in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under

subparagraphs (B) and (C)--

**(aa)** for the first program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is undertaking such actions, including any necessary procurement procedures, to put in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C); and

**(bb)** for the second program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is in compliance with subparagraphs (B) and (C).

Any school that is unable to certify compliance with such requirements in such second program year shall be ineligible for services at discount rates or funding in lieu of services at such rates under this subsection for such second year and all subsequent program years under this subsection, until such time as such school comes into compliance with this paragraph.

### (III) Waivers

Any school subject to subclause (II) that cannot come into compliance with subparagraphs (B) and (C) in such second year program may seek a waiver of subclause (II)(bb) if State or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required by such subclause. A school, school board, local educational agency, or other authority with responsibility for administration of the school shall notify the Commission of the applicability of such subclause to the school. Such notice shall certify that the school in question will be brought into compliance before the start of the third program year after the effective date of this subsection in which the school is applying for funds under this subsection.

### (F) Noncompliance

#### (i) Failure to submit certification

Any school that knowingly fails to comply with the application guidelines regarding the annual submission of certification required by this paragraph shall not be eligible for services at discount rates or funding in lieu of services at such rates under this subsection.

#### (ii) Failure to comply with certification

Any school that knowingly fails to ensure the use of its computers in accordance with a certification under subparagraphs (B) and (C) shall reimburse any funds and discounts received under this subsection for the period covered by such certification.

(iii) Remedy of noncompliance

(I) Failure to submit certification

A school that has failed to submit a certification under clause (i) may remedy the failure by submitting the certification to which the failure relates. Upon submittal of such certification, the school shall be eligible for services at discount rates under this subsection.

(II) Failure to comply with certification

A school that has failed to comply with a certification as described in clause (ii) may remedy the failure by ensuring the use of its computers in accordance with such certification. Upon submittal to the Commission of a certification or other appropriate evidence of such remedy, the school shall be eligible for services at discount rates under this subsection.

(6) Requirements for certain libraries with computers having internet access

(A) Internet safety

(i) In general

Except as provided in clause (ii), a library having one or more computers with Internet access may not receive services at discount rates under paragraph (1)(B) unless the library--

**(I)** submits to the Commission the certifications described in subparagraphs (B) and (C); and

**(II)** submits to the Commission a certification that an Internet safety policy has been adopted and implemented for the library under subsection (I) of this section; and

**(III)** ensures the use of such computers in accordance with the certifications.

(ii) Applicability



The prohibition in clause (i) shall not apply with respect to a library that receives services at discount rates under paragraph (1)(B) only for purposes other than the provision of Internet access, Internet service, or internal connections.

(iii) Public notice; hearing

A library described in clause (i) shall provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy.

(B) Certification with respect to minors

A certification under this subparagraph is a certification that the library--

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--

(I) obscene;

(II) child pornography; or

(III) harmful to minors; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors.

(C) Certification with respect to adults

A certification under this paragraph is a certification that the library--

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--

(I) obscene; or

(II) child pornography; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers.

(D) Disabling during adult use

An administrator, supervisor, or other person authorized by the certifying authority under subparagraph (A)(i) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.

(E) Timing of implementation

(i) In general

Subject to clause (ii) in the case of any library covered by this paragraph as of the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certification under subparagraphs (B) and (C) shall be made--

(I) with respect to the first program funding year under this subsection following such effective date, not later than 120 days after the beginning of such program funding year; and

(II) with respect to any subsequent program funding year, as part of the application process for such program funding year.

(ii) Process

(I) Libraries with Internet safety policy and technology protection measures in place

A library covered by clause (i) that has in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C) shall certify its compliance with subparagraphs (B) and (C) during each annual program application cycle under this subsection, except that with respect to the first program funding year after the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certifications shall be made not later than 120 days after the beginning of such first program funding year.

(II) Libraries without internet safety policy and technology protection measures in place

A library covered by clause (i) that does not have in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C)--

(aa) for the first program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is undertaking such actions, including any necessary procurement procedures, to put in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C); and

(bb) for the second program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is in compliance with subparagraphs (B) and (C).

Any library that is unable to certify compliance with such requirements in such second program year shall be ineligible for services at discount rates or funding in lieu of services at such rates under this subsection for such second year and all subsequent program years under this subsection, until such time as such library comes into compliance with this paragraph.

### (III) Waivers

Any library subject to subclause (II) that cannot come into compliance with subparagraphs (B) and (C) in such second year may seek a waiver of subclause (II)(bb) if State or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required by such subclause. A library, library board, or other authority with responsibility for administration of the library shall notify the Commission of the applicability of such subclause to the library. Such notice shall certify that the library in question will be brought into compliance before the start of the third program year after the effective date of this subsection in which the library is applying for funds under this subsection.

### (F) Noncompliance

#### (i) Failure to submit certification

Any library that knowingly fails to comply with the application guidelines regarding the annual submission of certification required by this paragraph shall not be eligible for services at discount rates or funding in lieu of services at such rates under this subsection.

(ii) Failure to comply with certification

Any library that knowingly fails to ensure the use of its computers in accordance with a certification under subparagraphs (B) and (C) shall reimburse all funds and discounts received under this subsection for the period covered by such certification.

(iii) Remedy of noncompliance

(I) Failure to submit

A library that has failed to submit a certification under clause (i) may remedy the failure by submitting the certification to which the failure relates. Upon submittal of such certification, the library shall be eligible for services at discount rates under this subsection.

(II) Failure to comply

A library that has failed to comply with a certification as described in clause (ii) may remedy the failure by ensuring the use of its computers in accordance with such certification. Upon submittal to the Commission of a certification or other appropriate evidence of such remedy, the library shall be eligible for services at discount rates under this subsection.

(7) Definitions

For purposes of this subsection:

(A) Elementary and secondary schools

The term “elementary and secondary schools” means elementary schools and secondary schools, as defined in section 7801 of Title 20.

(B) Health care provider

The term “health care provider” means--

(i) post-secondary educational institutions offering health care instruction, teaching hospitals, and medical schools;

- (ii) community health centers or health centers providing health care to migrants;
- (iii) local health departments or agencies;
- (iv) community mental health centers;
- (v) not-for-profit hospitals;
- (vi) rural health clinics; and
- (vii) consortia of health care providers consisting of one or more entities described in clauses (i) through (vi).

(C) Public institutional telecommunications user

The term “public institutional telecommunications user” means an elementary or secondary school, a library, or a health care provider as those terms are defined in this paragraph.

(D) Minor

The term “minor” means any individual who has not attained the age of 17 years.

(E) Obscene

The term “obscene” has the meaning given such term in section 1460 of Title 18.

(F) Child pornography

The term “child pornography” has the meaning given such term in section 2256 of Title 18.

(G) Harmful to minors

The term “harmful to minors” means any picture, image, graphic image file, or other visual depiction that--

- (i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

(ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and

(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

(H) Sexual act; sexual contact

The terms “sexual act” and “sexual contact” have the meanings given such terms in section 2246 of Title 18.

(I) Technology protection measure

The term “technology protection measure” means a specific technology that blocks or filters Internet access to the material covered by a certification under paragraph (5) or (6) to which such certification relates.

(i) Consumer protection

The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.

(j) Lifeline assistance

Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.

(k) Subsidy of competitive services prohibited

A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

(l) Internet safety policy requirement for schools and libraries

(1) In general

In carrying out its responsibilities under subsection (h) of this section, each school or library to which subsection (h) of this section applies shall--

(A) adopt and implement an Internet safety policy that addresses--

(i) access by minors to inappropriate matter on the Internet and World Wide Web;

(ii) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications;

(iii) unauthorized access, including so-called "hacking", and other unlawful activities by minors online;

(iv) unauthorized disclosure, use, and dissemination of personal identification information regarding minors; and

(v) measures designed to restrict minors' access to materials harmful to minors; and

(B) provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy.

(2) Local determination of content

A determination regarding what matter is inappropriate for minors shall be made by the school board, local educational agency, library, or other authority responsible for making the determination. No agency or instrumentality of the United States Government may--

(A) establish criteria for making such determination;

(B) review the determination made by the certifying school, school board, local educational agency, library, or other authority; or

(C) consider the criteria employed by the certifying school, school board, local educational agency, library, or other authority in the administration of subsection (h)(1)(B) of this section.

(3) Availability for review

Each Internet safety policy adopted under this subsection shall be made available to the Commission, upon request of the Commission, by the school, school board, local educational agency, library, or other authority responsible for adopting such Internet safety policy for purposes of the review of such Internet safety policy by the Commission.

(4) Effective date

This subsection shall apply with respect to schools and libraries on or after the date that is 120 days after December 21, 2000.



**CODE OF FEDERAL REGULATIONS**  
**TITLE 47—TELECOMMUNICATION**  
**CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION**  
**SUBCHAPTER B—COMMON CARRIER SERVICES**  
**PART 54—UNIVERSAL SERVICE**  
**SUBPART F—UNIVERSAL SERVICE SUPPORT FOR SCHOOLS AND**  
**LIBRARIES**

**§ 54.504 Requests for services.**

(a) *Competitive bid requirements.* Except as provided in § 54.511(c), an eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under §§ 54.502 and 54.503. These competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements.

(b) *Posting of FCC Form 470.* (1) An eligible school, library, or consortium that includes an eligible school or library seeking to receive discounts for eligible services under this subpart, shall submit a completed FCC Form 470 to the Administrator. FCC Form 470 shall include, at a minimum, the following information, to the extent applicable with respect to the services requested:

(i) The computer equipment currently available or budgeted for purchase for the current, next, or other future academic years, as well as whether the computers have modems and, if so, what speed modems;

(ii) The internal connections, if any, that the school or library has in place or has budgeted to install in the current, next, or future academic years, or any specific plans for an organized voluntary effort to connect the classrooms;

(iii) The computer software necessary to communicate with other computers over an internal network and over the public telecommunications network currently available or budgeted for purchase for the current, next, or future academic years;

(iv) The experience of, and training received by, the relevant staff in the use of the equipment to be connected to the telecommunications network and training programs for which funds are committed for the current, next, or future academic years;

(v) Existing or budgeted maintenance contracts to maintain computers; and

(vi) The capacity of the school's or library's electrical system in terms of how many computers can be operated simultaneously without creating a fire hazard.

(2) FCC Form 470 shall be signed by the person authorized to order telecommunications and other supported services for the eligible school, library, or consortium and shall include that person's certification under oath that:

(i) The school or library is an eligible entity under §§ 254(h)(4) and 254(h)(5) of the Act and the rules adopted under this subpart;

(ii) The services requested will be used solely for educational purposes;

(iii) The services will not be sold, resold, or transferred in consideration for money or any other thing of value;

(iv) If the services are being purchased as part of an aggregated purchase with other entities, the request identifies all co-purchasers and the services or portion of the services being purchased by the school or library;

(v) All of the necessary funding in the current funding year has been budgeted and approved to pay for the "non-discount" portion of requested connections and services as well as any necessary hardware or software, and to undertake the necessary staff training required to use the services effectively;

(vi) The school, library, or consortium including those entities has complied with all applicable state and local procurement processes; and

(vii) The school, library, or consortium including those entities has a

technology plan that has been certified by its state, the Administrator, or an independent entity approved by the Commission.

(3) The Administrator shall post each FCC Form 470 that it receives from an eligible school, library, or consortium that includes an eligible school or library on its website designated for this purpose.

(4) After posting on the Administrator's website an eligible school's, library's, or consortium's FCC Form 470, the Administrator shall send confirmation of the posting to the entity requesting service. That entity shall then wait at least four weeks from the date on which its description of services is posted on the Administrator's website before making commitments with the selected providers of services. The confirmation from the Administrator shall include the date after which the requestor may sign a contract with its chosen provider(s).

(c) *Filing of FCC Form 471.* An eligible school, library, or consortium that includes an eligible school or library seeking to receive discounts for eligible services under this subpart, shall, upon signing a contract for eligible services, submit a completed FCC Form 471 to the Administrator. A commitment of support is contingent upon the filing of FCC Form 471.

(d) *Rate disputes.* Schools, libraries, and consortia including those entities, and service providers may have recourse to the Commission, regarding interstate rates, and to state commissions, regarding intrastate rates, if they reasonably believe that the lowest corresponding price is unfairly high or low.

(1) Schools, libraries, and consortia including those entities may request lower rates if the rate offered by the carrier does not represent the lowest corresponding price.

(2) Service providers may request higher rates if they can show that the lowest corresponding price is not compensatory, because the relevant school, library, or consortium including those entities is not similarly situated to and subscribing to a similar set of services to the customer paying the lowest corresponding price.

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**§ 54.504 Requests for services.**

(a) *Competitive bid requirements.* Except as provided in § 54.511(c), an eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under §§ 54.502 and 54.503. These competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements.

(b) *Posting of FCC Form 470.* (1) An eligible school, library, or consortium that includes an eligible school or library seeking to receive discounts for eligible services under this subpart, shall submit a completed FCC Form 470 to the Administrator. FCC Form 470 shall include, at a minimum, the following information, to the extent applicable with respect to the services requested:

(i) The computer equipment currently available or budgeted for purchase for the current, next, or other future academic years, as well as whether the computers have modems and, if so, what speed modems;

(ii) The internal connections, if any, that the school or library has in place or has budgeted to install in the current, next, or future academic years, or any specific plans for an organized voluntary effort to connect the classrooms;

(iii) The computer software necessary to communicate with other computers over an internal network and over the public telecommunications network currently available or budgeted for purchase for the current, next, or future academic years;

(iv) The experience of, and training received by, the relevant staff in the use of the equipment to be connected to the telecommunications network and training programs for which funds are committed for the current, next, or future academic years;

(v) Existing or budgeted maintenance contracts to maintain computers; and

(vi) The capacity of the school's or library's electrical system in terms of how many computers can be operated simultaneously without creating a fire hazard.

(2) FCC Form 470 shall be signed by the person authorized to order telecommunications and other supported services for the eligible school, library, or consortium and shall include that person's certification under oath that:

(i) The school or library is an eligible entity under §§ 254(h)(4) and 254(h)(5) of the Act and the rules adopted under this subpart;

(ii) The services requested will be used solely for educational purposes;

(iii) The services will not be sold, resold, or transferred in consideration for money or any other thing of value;

(iv) If the services are being purchased as part of an aggregated purchase with other entities, the request identifies all co-purchasers and the services or portion of the services being purchased by the school or library;

(v) All of the necessary funding in the current funding year has been budgeted and approved to pay for the "non-discount" portion of requested connections and services as well as any necessary hardware or software, and to undertake the necessary staff training required to use the services effectively;

(vi) The school, library, or consortium including those entities has complied with all applicable state and local procurement processes; and

(vii) The school, library, or consortium including those entities has a technology plan that has been certified by its state, the Administrator, or an independent entity approved by the Commission.

(3) The Administrator shall post each FCC Form 470 that it receives from an eligible school, library, or consortium that includes an eligible school or library on its website designated for this purpose.

(4) After posting on the Administrator's website an eligible school's, library's, or consortium's FCC Form 470, the Administrator shall send confirmation of the posting to the entity requesting service. That entity shall then wait at least four weeks from the date on which its description of services is posted on the Administrator's website before making commitments with the selected providers of services. The confirmation from the Administrator shall include the date after which the requestor may sign a contract with its chosen provider(s).

(c) *Filing of FCC Form 471.* An eligible school, library, or consortium that includes an eligible school or library seeking to receive discounts for eligible services under this subpart, shall, upon signing a contract for eligible services, submit a completed FCC Form 471 to the Administrator. A commitment of support is contingent upon the filing of FCC Form 471.

(d) *Rate disputes.* Schools, libraries, and consortia including those entities, and service providers may have recourse to the Commission, regarding interstate rates, and to state commissions, regarding intrastate rates, if they reasonably believe that the lowest corresponding price is unfairly high or low.

(1) Schools, libraries, and consortia including those entities may request lower rates if the rate offered by the carrier does not represent the lowest corresponding price.

(2) Service providers may request higher rates if they can show that the lowest corresponding price is not compensatory, because the relevant school, library, or consortium including those entities is not similarly situated to and subscribing to a similar set of services to the customer paying the lowest corresponding price.

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**LIBRARIES**

**§ 54.504 Requests for services.**

(a) *Competitive bid requirements.* Except as provided in § 54.511(c), an eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under §§ 54.502 and 54.503. These competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements.

(b) *Posting of FCC Form 470.* (1) An eligible school, library, or consortium that includes an eligible school or library seeking to receive discounts for eligible services under this subpart, shall submit a completed FCC Form 470 to the Administrator. FCC Form 470 shall include, at a minimum, the following information, to the extent applicable with respect to the services requested:

(i) The computer equipment currently available or budgeted for purchase for the current, next, or other future academic years, as well as whether the computers have modems and, if so, what speed modems;

(ii) The internal connections, if any, that the school or library has in place or has budgeted to install in the current, next, or future academic years, or any specific plans for an organized voluntary effort to connect the classrooms;

(iii) The computer software necessary to communicate with other computers over an internal network and over the public telecommunications network currently available or budgeted for purchase for the current, next, or future academic years;

(iv) The experience of, and training received by, the relevant staff in the use of the equipment to be connected to the telecommunications network and training programs for which funds are committed for the current, next, or future academic years;

(v) Existing or budgeted maintenance contracts to maintain computers; and

(vi) The capacity of the school's or library's electrical system in terms of how many computers can be operated simultaneously without creating a fire hazard.

(2) FCC Form 470 shall be signed by the person authorized to order telecommunications and other supported services for the eligible school, library, or consortium and shall include that person's certification under oath that:

(i) The school or library is an eligible entity under §§ 254(h)(4) and 254(h)(5) of the Act and the rules adopted under this subpart;

(ii) The services requested will be used solely for educational purposes;

(iii) The services will not be sold, resold, or transferred in consideration for money or any other thing of value;

(iv) If the services are being purchased as part of an aggregated purchase with other entities, the request identifies all co-purchasers and the services or portion of the services being purchased by the school or library;

(v) All of the necessary funding in the current funding year has been budgeted and approved to pay for the "non-discount" portion of requested connections and services as well as any necessary hardware or software, and to undertake the necessary staff training required to use the services effectively;

(vi) The school, library, or consortium including those entities has complied with all applicable state and local procurement processes; and

(vii) The school, library, or consortium including those entities has a technology plan that has been certified by its state, the Administrator, or an independent entity approved by the Commission.

(3) The Administrator shall post each FCC Form 470 that it receives from an eligible school, library, or consortium that includes an eligible school or library on its website designated for this purpose.

(4) After posting on the Administrator's website an eligible school's, library's, or consortium's FCC Form 470, the Administrator shall send confirmation of the posting to the entity requesting service. That entity shall then wait at least four weeks from the date on which its description of services is posted on the Administrator's website before making commitments with the selected providers of services. The confirmation from the Administrator shall include the date after which the requestor may sign a contract with its chosen provider(s).

(c) *Filing of FCC Form 471.* An eligible school, library, or consortium that includes an eligible school or library seeking to receive discounts for eligible services under this subpart, shall, upon signing a contract for eligible services, submit a completed FCC Form 471 to the Administrator. A commitment of support is contingent upon the filing of FCC Form 471.

(d) *Mixed eligibility requests.* If 30 percent or more of a request for discounts made in an FCC Form 471 is for ineligible services, the request shall be denied in its entirety.

(e) *Rate disputes.* Schools, libraries, and consortia including those entities, and service providers may have recourse to the Commission, regarding interstate rates, and to state commissions, regarding intrastate rates, if they reasonably believe that the lowest corresponding price is unfairly high or low.

(1) Schools, libraries, and consortia including those entities may request lower rates if the rate offered by the carrier does not represent the lowest corresponding price.

(2) Service providers may request higher rates if they can show that the lowest corresponding price is not compensatory, because the relevant school, library, or consortium including those entities is not similarly situated to and subscribing to a similar set of services to the customer paying the lowest corresponding price.

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**§ 54.504 Requests for services.**

(a) *Competitive bid requirements.* Except as provided in § 54.511(c), an eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under §§ 54.502 and 54.503. These competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements.

(b) *Posting of FCC Form 470.* (1) An eligible school, library, or consortium that includes an eligible school or library seeking to receive discounts for eligible services under this subpart, shall submit a completed FCC Form 470 to the Administrator. FCC Form 470 shall include, at a minimum, the following information, to the extent applicable with respect to the services requested:

(i) The computer equipment currently available or budgeted for purchase for the current, next, or other future academic years, as well as whether the computers have modems and, if so, what speed modems;

(ii) The internal connections, if any, that the school or library has in place or has budgeted to install in the current, next, or future academic years, or any specific plans for an organized voluntary effort to connect the classrooms;

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(iv) The experience of, and training received by, the relevant staff in the use of the equipment to be connected to the telecommunications network and training programs for which funds are committed for the current, next, or future academic years;

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(vi) The capacity of the school's or library's electrical system in terms of how many computers can be operated simultaneously without creating a fire hazard.

(2) FCC Form 470 shall be signed by the person authorized to order telecommunications and other supported services for the eligible school, library, or consortium and shall include that person's certification under oath that:

(i) The school or library is an eligible entity under §§ 254(h)(4) and 254(h)(5) of the Act and the rules adopted under this subpart;

(ii) The services requested will be used solely for educational purposes;

(iii) The services will not be sold, resold, or transferred in consideration for money or any other thing of value, and will not be transferred, with or without consideration for money or any other thing of value, except as permitted by the Commission's rules;

(iv) If the services are being purchased as part of an aggregated purchase with other entities, the request identifies all co-purchasers and the services or portion of the services being purchased by the school or library;

(v) All of the necessary funding in the current funding year has been budgeted and approved to pay for the "non-discount" portion of requested connections and services as well as any necessary hardware or software, and to undertake the necessary staff training required to use the services effectively;

(vi) The school, library, or consortium including those entities has complied with all applicable state and local procurement processes; and

(vii) The school, library, or consortium including those entities has a technology plan that has been certified by its state, the Administrator, or an independent entity approved by the Commission.

(3) The Administrator shall post each FCC Form 470 that it receives from an eligible school, library, or consortium that includes an eligible school or library on its website designated for this purpose.

(4) After posting on the Administrator's website an eligible school's, library's, or consortium's FCC Form 470, the Administrator shall send confirmation of the posting to the entity requesting service. That entity shall then wait at least four weeks from the date on which its description of services is posted on the Administrator's website before making commitments with the selected providers of services. The confirmation from the Administrator shall include the date after which the requestor may sign a contract with its chosen provider(s).

(c) *Filing of FCC Form 471.* An eligible school, library, or consortium that includes an eligible school or library seeking to receive discounts for eligible services under this subpart, shall, upon signing a contract for eligible services, submit a completed FCC Form 471 to the Administrator. A commitment of support is contingent upon the filing of FCC Form 471.

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(e) *Rate disputes.* Schools, libraries, and consortia including those entities, and service providers may have recourse to the Commission, regarding interstate rates, and to state commissions, regarding intrastate rates, if they reasonably believe that the lowest corresponding price is unfairly high or low.

(1) Schools, libraries, and consortia including those entities may request lower rates if the rate offered by the carrier does not represent the lowest corresponding price.

(2) Service providers may request higher rates if they can show that the lowest corresponding price is not compensatory, because the relevant school, library, or consortium including those entities is not similarly situated to and subscribing to a similar set of services to the customer paying the lowest corresponding price.

(f) *Service substitution.* (1) The Administrator shall grant a request by an applicant to substitute a service or product for one identified on its FCC Form 471 where:

(i) The service or product has the same functionality;

(ii) The substitution does not violate any contract provisions or state or local procurement laws;

(iii) The substitution does not result in an increase in the percentage of ineligible services or functions; and

(iv) The applicant certifies that the requested change is within the scope of the controlling FCC Form 470, including any associated Requests for Proposal, for the original services.

(2) In the event that a service substitution results in a change in the pre-discount price for the supported service, support shall be based on the lower of either the pre-discount price of the service for which support was originally requested or the pre-discount price of the new, substituted service.

(3) For purposes of this rule, the broad categories of eligible services (telecommunications service, Internet access, and internal connections) are not deemed to have the same functionality with one another.

(g) *Mixed eligibility services.* A request for discounts for a product or service that includes both eligible and ineligible components must allocate the cost of the contract to eligible and ineligible components.

(1) *Ineligible components.* If a product or service contains ineligible components, costs must be allocated to the extent that a clear delineation can be made between the eligible and ineligible components. The delineation must have a tangible basis, and the price for the eligible portion must be the most cost-effective means of receiving the eligible service.

(2) *Ancillary ineligible components.* If a product or service contains ineligible components that are ancillary to the eligible components, and the product or service is the most cost-effective means of receiving the eligible component functionality, without regard to the value of the ineligible component, costs need not be allocated between the eligible and ineligible components. Discounts shall be provided on the full cost of the product or service. An ineligible component is "ancillary" if a price for the ineligible component cannot be determined separately and independently from the price of the eligible components, and the specific package remains the most cost-effective means



of receiving the eligible services, without regard to the value of the ineligible functionality.

(3) The Administrator shall utilize the cost allocation requirements of this subparagraph in evaluating mixed eligibility requests under § 54.504(d)(1).

[62 FR 32948, June 17, 1997, as amended at 62 FR 41304, Aug. 1, 1997; 63 FR 2129, Jan. 13, 1998; 63 FR 70572, Dec. 21, 1998; 68 FR 36942, June 20, 2003; 69 FR 6190, Feb. 10, 2004]

EFFECTIVE DATE NOTE: At 69 FR 55109, Sept. 13, 2004, § 54.504 was amended by revising paragraph (b)(2), by adding paragraphs (c)(1) and (f), and by adding and reserving paragraph (c)(2). This text contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget. For the convenience of the user, the added and revised text is set forth as follows:

**§ 54.504 Request for services.**

\* \* \* \* \*

(b) \* \* \*

(2) FCC Form 470 shall be signed by the person authorized to order telecommunications and other supported services for the eligible school, library, or consortium and shall include that person's certification under oath that:

(i) The schools meet the statutory definition of elementary and secondary schools found under section 254(h) of the Act, as amended in the No Child Left Behind Act of 2001, 20 U.S.C. 7801(18) and (38), do not operate as for-profit businesses, and do not have endowments exceeding \$50 million;

(ii) The libraries or library consortia eligible for assistance from a State library administrative agency under the Library Services and Technology Act of 1996 do not operate as for-profit businesses and whose budgets are completely separate from any school (including, but not limited to, elementary and secondary schools, colleges, and universities).

(iii) All of the individual schools, libraries, and library consortia receiving services are covered by:

(A) Individual technology plans for using the services requested in the application; and/or

(B) Higher-level technology plans for using the services requested in the application; or

(C) No technology plan needed because application requests basic local and/or long distance service and/or voicemail only.

(iv) The technology plan(s) has/have been approved by a state or other authorized body; the technology plan(s) will be approved by a state or other authorized body; or no

technology plan needed because applicant is applying for basic local, cellular, PCS, and/or long distance telephone service and/or voicemail only.

(v) The services the applicant purchases at discounts will be used solely for educational purposes and will not be sold, resold, or transferred in consideration for money or any other thing of value.

(vi) Support under this support mechanism is conditional upon the school(s) and library(ies) securing access to all of the resources, including computers, training, software, maintenance, internal connections, and electrical connections necessary to use the services purchased effectively.

(vii) All bids submitted will be carefully considered and the bid selected will be for the most cost-effective service or equipment offering, with price being the primary factor, and will be the most cost-effective means of meeting educational needs and technology plan goals.

\* \* \* \* \*

(c) \* \* \*

(1) FCC Form 471 shall be signed by the person authorized to order telecommunications and other supported services for the eligible school, library, or consortium and shall include that person's certification under oath that:

(i) The schools meet the statutory definition of elementary and secondary schools found under section 254(h) of the Act, as amended in the No Child Left Behind Act of 2001, 20 U.S.C. 7801(18) and (38), do not operate as for-profit businesses, and do not have endowments exceeding \$50 million.

(ii) The libraries or library consortia eligible for assistance from a State library administrative agency under the Library Services and Technology Act of 1996 do not operate as for-profit businesses and whose budgets are completely separate from any school (including, but not limited to, elementary and secondary schools, colleges, and universities).

(iii) The entities listed on the FCC Form 471 application have secured access to all of the resources, including computers, training, software, maintenance, internal connections, and electrical connections, necessary to make effective use of the services purchased, as well as to pay the discounted charges for eligible services from funds to which access has been secured in the current funding year. The billed entity will pay the non-discount portion of the cost of the goods and services to the service provider(s).

(iv) All of the schools and libraries listed on the FCC Form 471 application are covered by:

(A) An individual technology plan for using the services requested in the application; and/or

(B) Higher-level technology plan(s) for using the services requested in the FCC Form 471 application; or

(C) No technology plan needed; applying for basic local and long distance telephone service only.

(v) Status of technology plan(s) has/have been approved; will be approved by a state or other authorized body; or no technology plan is needed because applicant is applying for basic local, cellular, PCS, and/or long distance telephone service and/or voicemail only.

(vi) The entities listed on the FCC Form 471 application have complied with all applicable state and local laws regarding procurement of services for which support is being sought.

(vii) The services the applicant purchases at discounts will be used solely for educational purposes and will not be sold, resold, or transferred in consideration for money or any other thing of value.

(viii) The entities listed in the application have complied with all program rules and acknowledge that failure to do so may result in denial of discount funding and/or recovery of funding.

(ix) The applicant understands that the discount level used for shared services is conditional, for future years, upon ensuring that the most disadvantaged schools and libraries that are treated as sharing in the service, receive an appropriate share of benefits from those services.

(x) The applicant recognizes that it may be audited pursuant to its application, that it will retain for five years any and all worksheets and other records relied upon to fill out its application, and that, if audited, it will make such records available to the Administrator.

(xi) All bids submitted were carefully considered and the most cost-effective bid for services or equipment was selected, with price being the primary factor considered, and is the most cost-effective means of meeting educational needs and technology plan goals.

\* \* \* \* \*

(f) *Filing of FCC Form 473.* All service providers eligible to provide telecommunications and other supported services under this subpart shall submit annually a completed FCC Form 473 to the Administrator. FCC Form 473 shall be signed by an authorized person and shall include that person's certification under oath that:

(1) The prices in any offer that this service provider makes pursuant to the schools and libraries universal service support program have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor

relating to those prices, the intention to submit an offer, or the methods or factors used to calculate the prices offered;

(2) The prices in any offer that this service provider makes pursuant to the schools and libraries universal service support program will not be knowingly disclosed by this service provider, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and

(3) No attempt will be made by this service provider to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

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**§ 54.511 Ordering services.**

(a) *Selecting a provider of eligible services.* In selecting a provider of eligible services, schools, libraries, library consortia, and consortia including any of those entities shall carefully consider all bids submitted and may consider relevant factors other than the pre-discount prices submitted by providers.

(b) *Lowest corresponding price.* Providers of eligible services shall not 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 respect to interstate services or the state commission with respect to intrastate services, finds that the lowest corresponding price is not compensatory. Promotional rates offered by a service provider for a period of more than 90 days must be included among the comparable rates upon which the lowest corresponding price is determined.

(c) *Existing contracts.* (1) A signed contract for services eligible for discounts pursuant to this subpart between an eligible school or library as defined under § 54.501 or consortium that includes an eligible school or library and a service provider shall be exempt from the requirements set forth in § 54.504(a), (b)(3), and (b)(4) as follows:

(i) A contract signed on or before July 10, 1997 is exempt from the competitive bid requirements for the life of the contract; or

(ii) A contract signed after July 10, 1997, but before the date on which the universal service competitive bid system described in § 54.504 is operational, is exempt from the competitive bid requirements only with respect to services that are provided under such contract between January 1, 1998 and December 31, 1998.

(2) For a school, library, or consortium that includes an eligible school or library that takes service under or pursuant to a master contract, the date of execution of that master contract represents the applicable date for purposes of determining whether and to what extent the school, library, or consortium is exempt from the competitive bid requirements.

(3) The competitive bid system will be deemed to be operational when the Administrator is ready to accept and post FCC Form 470 from schools and libraries on a website and that website is available for use by service providers.

(d)(1) The exemption from the competitive bid requirements set forth in paragraph (c) of this section shall not apply to voluntary extensions or renewals of existing contracts, with the exception that an eligible school or library as defined under § 54.501 or consortium that includes an eligible school or library, that filed an application within the 75-day initial filing window for 1998 (January 30, 1998–April 15, 1998), may voluntarily extend or renew, to a date no later than June 30, 1999, an existing contract that otherwise would terminate between April 15, 1998 and June 30, 1999.

(2) For the 1998–1999 funding year, a contract exempt from the competitive bid requirement, as described in paragraph (c) of this section, may be voluntarily extended to September 30, 1999 only to the extent necessary to permit delivery of the nonrecurring services subject to that contract and for which discounts have been approved.

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**§ 54.511 Ordering services.**

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(b) *Lowest corresponding price.* Providers of eligible services shall not 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 respect to interstate services or the state commission with respect to intrastate services, finds that the lowest corresponding price is not compensatory. Promotional rates offered by a service provider for a period of more than 90 days must be included among the comparable rates upon which the lowest corresponding price is determined.

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(i) A contract signed on or before July 10, 1997 is exempt from the competitive bid requirements for the life of the contract; or

(ii) A contract signed after July 10, 1997, but before the date on which the universal service competitive bid system described in § 54.504 is operational, is exempt from the competitive bid requirements only with respect to services that are provided under such contract between January 1, 1998 and December 31, 1998.

(2) For a school, library, or consortium that includes an eligible school or library that takes service under or pursuant to a master contract, the date of execution of that master contract represents the applicable date for purposes of determining whether and to what extent the school, library, or consortium is exempt from the competitive bid requirements.

(3) The competitive bid system will be deemed to be operational when the Administrator is ready to accept and post FCC Form 470 from schools and libraries on a website and that website is available for use by service providers.

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**§ 54.511 Ordering services.**

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(b) *Lowest corresponding price.* Providers of eligible services shall not 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 respect to interstate services or the state commission with respect to intrastate services, finds that the lowest corresponding price is not compensatory. Promotional rates offered by a service provider for a period of more than 90 days must be included among the comparable rates upon which the lowest corresponding price is determined.

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**12-60070**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**Joseph M. Hill, Trustee in Bankruptcy for Lakehills Consulting, L.P.,  
Petitioner,**

**v.**

**Federal Communications Commission and United States of America,  
Respondents.**

**CERTIFICATE OF SERVICE**

I, Hillary B. Burchuk, hereby certify that on May 24, 2012, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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