



December 13, 2018

FILED IN ECFS WITH COPY SENT VIA EMAIL

Kris Monteith
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CC Docket No. 02-6, Schools and Libraries Universal Service Support Mechanism
WC Docket No. 13-184, Modernizing the E-rate Program for Schools and Libraries
E-rate Gift Rule Clarification

Dear Ms. Monteith:

The Schools, Health & Libraries Broadband Coalition (SHLB), the State E-rate Coordinators' Alliance (SECA), and CoSN – the Consortium for School Networking (CoSN) request your assistance in addressing an issue of concern regarding the E-rate gift rule.¹ In brief, earlier this year, without any notice or discussion, USAC abruptly updated its website to include a prohibition on product demonstrations. USAC has subsequently backed away from this position in trainings, suggesting that product demonstrations are still allowed at least some of the time, but the prohibition still appears on the website. This has caused unnecessary and harmful confusion, which we hope the Wireline Competition Bureau will help alleviate.

USAC's substantive revision of the gift rule is inconsistent not only with Commission precedent, but also with the guidance that USAC itself has recently given applicants in its E-rate trainings. E-rate stakeholders understand that USAC's goal is to protect the Fund. However, a blanket prohibition on product demonstrations—or a climate of uncertainty that leads stakeholders to avoid product demonstrations out of caution—actually harms the competitive bidding process, because it hinders applicants' ability to assess the cost-effectiveness of the bids they receive. For these reasons, we respectfully ask that the Bureau direct USAC to remove the prohibition from its website and, if necessary, clarify that product demonstrations are not considered gifts under Commission precedent.

Our organizations share the Commission's goal of ensuring the best and most efficient use of universal service funds, and that is why we are concerned about USAC's interpretation of the E-rate program's gift rule.

¹ 47 C.F.R. § 54.503(d).

Background

The Commission originally adopted the E-rate gift rule in 2010, in its *Sixth Report and Order*.² In the notice of proposed rulemaking that preceded the *Order*, the Commission sought comment on whether service providers should be allowed to provide “information to an applicant about [the service provider’s] products and services—including demonstrations”—before the competitive bidding process, but be prohibited from doing so during the 28-day competitive bidding period.³ In response to comments, in the *Order* the Commission revised that proposal to allow service providers to provide information about their products, including demonstrations, both before *and* during the competitive bidding process.⁴ The Commission has never changed that policy.

To the best of our knowledge, over the years USAC’s explanation of the Commission’s gift rule has been consistent with the *Sixth Report and Order* precedent. That changed in 2018. In the spring of this year, USAC abruptly changed the language on the “Gift Rules” page on its website to state that the E-rate gift rule prohibits the acceptance of “loans of products, including those characterized as on-site product demonstrations,” with no exceptions.⁵ USAC had given stakeholders no prior notice that it was making this change.

Three months later, in August, USAC conducted a webinar in which it told E-rate stakeholders that product demonstrations are permitted before the competitive bidding process commences, but are prohibited during the competitive bidding process.⁶ Although it appeared from the August webinar that USAC had revised its guidance, the language quoted above still appears on the Gift Rules page on USAC’s website today, whereas the guidance given in the webinar cannot be found anywhere on USAC’s website. The Gift Rules page also states, consistent with Commission precedent, that “Restrictions on gifts apply all year, not just during the competitive bidding process.”⁷

Further, it appears that USAC is providing additional interpretations at E-rate trainings and in meetings with various stakeholder groups. Our organizations’ members have been told that there is no “safe harbor” period of time in which an applicant could test products without USAC considering that testing an improper “loan” of a product.⁸

² *Schools and Libraries Universal Service Support Mechanism; A National Broadband Plan For Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, *Sixth Report and Order*, 25 FCC Rcd 18762 (2010) (*Sixth Report and Order*).

³ *Schools and Libraries Universal Service Support Mechanism; A National Broadband Plan For Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Notice of Proposed Rulemaking, 25 FCC Rcd 6872 ¶ 30 (2010).

⁴ *Sixth Report and Order*, 25 FCC Rcd at 18803 ¶ 92.

⁵ See <https://www.usac.org/sl/applicants/step01/gift-rules.aspx> (last visited Dec. 6, 2018).

⁶ August Webinar Slide 11, attached.

⁷ See <https://www.usac.org/sl/applicants/step01/gift-rules.aspx> (last visited Dec. 6, 2018); *Sixth Report and Order*, 25 FCC Rcd at 18801 ¶ 88 (“[T]he restriction on gifts is always applicable, and is not in effect or triggered only during the time period the competitive bidding process is taking place.”).

⁸ USAC has also suggested that applicants memorialize why they are testing the equipment and why they needed to test it for a certain length of time. This suggestion will result in additional burdens on E-rate applicants—both to create the document and to retain it for at least 10 years.

These discrepancies have understandably created confusion for E-rate participants. Applicants are now unsure whether they can accept product demonstrations in order to help them decide which vendor is offering the most cost-effective bid.

Key Concerns About USAC’s Interpretation of the Gift Rule

Although it is first and foremost inconsistent with the authority delegated to USAC by the Commission, USAC’s upending of the Commission’s longstanding gift rule is not merely an academic exercise. It has real-world implications for E-rate participants. Below, we discuss our key concerns.

USAC does not have the authority to change or interpret Commission precedent.

First, USAC’s inconsistent interpretations of the gift rule constitute interpretations of the Commission’s rules and are therefore outside of USAC’s authority. USAC has cited no Commission precedent to support either of its interpretations of the gift rule (the version on the website or the version described in the August webinar), and we know of none. The key gift rule precedent is the *Sixth Report and Order*, and as we have explained, USAC’s statements appear to be at odds with that *Order*. USAC lacks the authority to change or interpret Commission precedent.⁹ But in revising the Commission’s gift rule itself, that is precisely what USAC has done.

USAC’s interpretations have a chilling effect on product demonstrations, which may prevent applicants from selecting the most cost-effective services. Second, as noted above, USAC’s inconsistent interpretations of the gift rule have created confusion about whether and when service providers can offer product demonstrations at all. This confusion is problematic because product demonstrations can be essential to the process of making informed decisions and selecting the most cost-effective bids.

For example, Commission rules require that when soliciting bids for equipment, E-rate applicants may specify manufacturers only if they also include the phrase “or equivalent,” to ensure that potentially more cost-effective bids that use different equipment are not omitted.¹⁰ If an applicant is currently using, say, Cisco routers, it may issue a request for proposals seeking bids for “Cisco routers or equivalent.” In order to ensure that equipment from another manufacturer actually *is* equivalent to Cisco routers, the applicant may require an on-site demonstration to ensure that the proposed equipment is compatible with the network components the applicant already has in place.

⁹ 47 C.F.R. § 54.702(c) (“The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.”).

¹⁰ *Request for Review of a Decision of the Universal Service Administrator by Queen of Peace High School*, CC Docket No. 02-6, Order, 26 FCC Rcd 16466, 16469 ¶ 8 (Wireline Comp. Bur. 2011) (*Queen of Peace Order*).

In these circumstances, USAC's reinterpretation of the *Sixth Report and Order* actually harms the competitive bidding process. Without a product demonstration, the applicant may not be able to judge the cost-effectiveness of a competing bid that uses non-Cisco equipment. A bid that includes equipment that turns out to be incompatible with the applicant's existing network would not be cost-effective no matter how low the cost, and no reasonable applicant would risk that outcome. Thus, the product demonstration is essential to an informed assessment of the bids. USAC's interpretations of the gift rule—especially the outright ban on its website—thus eliminate an essential component of the competitive bidding process and harm the E-rate program.

Furthermore, product demonstrations are commonplace in the telecommunications and IT industries. There is nothing nefarious about them. They are used to make sure that the technology considered for purchase is useful or compatible with existing equipment. Typically, testing periods range from a few days to a few months. The Commission should not insert itself into a process that local governmental entities have been managing without outside guidance.

USAC's interpretation of the gift rules has affected more than just E-rate eligible products. If an applicant wants to demo a non-E-rate eligible product, such as filtering, and those products are tested by an applicant for some time period known as "too long" only to USAC, USAC could find that the applicant has received an improper gift. We have been told that some companies are refusing to demo *any* of their products for this reason. This could not have been USAC or the Commission's intent. Further, the rule is placing service providers that participate in the E-rate program at a competitive disadvantage when trying to sell services not eligible for E-rate with respect to those service providers that do not participate in the E-rate program. E-rate service providers have limitations on product demonstrations that the other providers do not face.

There is no evidence of problems with or abuses of product demonstrations. Third, USAC's inconsistent interpretations are troubling because we know of no evidence that USAC has identified actual problems with the use of product demonstrations. We know of no funding denials on that basis, nor have we seen or heard of any evidence that product demonstrations are being misused or abused. It appears that USAC's interpretations of the gift rule may be a solution in search of a problem, which leads us to wonder if USAC assumes that *any* provision of a product or service for demonstration purposes is inappropriate. This is untrue, as we have explained, as product demos play an essential role in the competitive bidding process.

USAC's webinar statement that a product demonstration is a gift only some of the time is directly contrary to Commission precedent. Finally, USAC's statement in the webinar is additionally unsupportable because it suggests that an item may be a gift some of the time, but not at other times. The gift rule includes no time restrictions: if an item is a gift, it is prohibited at all times (or for at least six months before the start of the competitive bidding process, for new E-rate participants).¹¹ USAC's own website states that "restrictions on gifts

¹¹ *Schools and Libraries Universal Service Support Mechanism; A National Broadband Plan For Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Order, 25 FCC Rcd 17324, 17330-31 ¶ 16 (2010) (requiring eligible entities applying for E-rate funding for the first time to have been in compliance with the Commission's E-rate rules for six months prior to filing an FCC Form 470).

apply all year.”¹² USAC’s webinar interpretation that product demonstrations are considered prohibited gifts during the competitive bidding process but are allowed prior to the competitive bidding process is directly contrary to the gift rule itself, which prohibits gifts at all times.

Request for Action

To address the issues outlined above, our organizations respectfully request that the Commission take the actions described herein. We note the urgency of this issue, as many applicants are well into the competitive bidding process for Funding Year 2019, and the application window is expected to open in January. We respectfully request that the Commission provide the requested relief below before the opening of the application window.

First, the Wireline Competition Bureau should direct USAC to remove the prohibition on on-site product demonstrations from its website. As we have noted, this language conflicts not only with the *Sixth Report and Order*, but also with USAC’s own guidance to program participants in its trainings.

Second, the Bureau should direct USAC to ensure that *all* of its communications with E-rate stakeholders regarding the gift rule are consistent with the language of the rule and the *Sixth Report and Order*. USAC may not decide on its own that an item is a gift if the Commission itself has not said so; nor may it determine that an item is a gift sometimes, but not at other times.

Beyond that, if the Commission believes that there is any need to clarify that product demonstrations are allowed by the E-rate gift rule, then it should do so. If the Commission believes that the provision of on-site product demonstrations is creating problems in the E-rate program—as we noted above, we know of no evidence of any such problems—then the Commission should initiate a rulemaking and solicit comments from E-rate stakeholders on this issue.

¹² See <https://www.usac.org/sl/applicants/step01/gift-rules.aspx> (last visited Dec. 6, 2018).

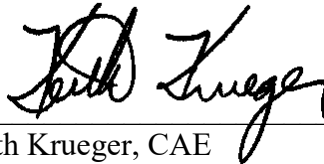
Conclusion

We thank you for your attention to this matter and would be happy to discuss further if it would be helpful. Please let us know if you have any questions.

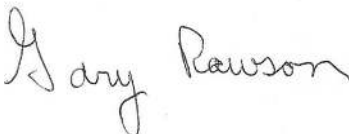
Sincerely,



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Attachment

cc: Mark Stephens, Managing Director



Understanding Competitive Bidding

E-rate Program Participant Webinar

August 22, 2018



Universal Service
Administrative Co.

Components of an Open and Fair Process *(For Service Providers)*

- Do not conduct product demonstrations or promotional sessions after the FCC Form 470 has been posted.
- Do not offer gifts, free services, devices, or non-E-rate discounts as a way to make your response more attractive.
- Do separate eligible and ineligible services in your response.
- Ask questions if the information provided by the applicant is unclear.
- Review all of the requirements included in the FCC Form 470 and/or request for proposal (RFP) documents to ensure that your bid is responsive.