

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

Petition of United States Telecom Association )  
and CTIA—The Wireless Association® for ) CC Docket No. 02-6  
Declaratory Ruling Clarifying Certain Aspects )  
of the “Lowest Corresponding Price” )  
Obligation of the Schools and Libraries )  
Universal Service Program )  
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**REPLY COMMENTS OF UNITED STATES TELECOM ASSOCIATION  
AND CTIA—THE WIRELESS ASSOCIATION®**

Petitioners United States Telecom Association and CTIA—The Wireless Association® (“Petitioners”) urge the Commission to grant their Petition to clarify certain aspects of the lowest corresponding price obligation.<sup>1</sup> As noted in the Petition, the Schools and Libraries Universal Service (“E-Rate”) program has evolved significantly since it was implemented more than twelve years ago, and there are now a number of ways in which the lowest corresponding price obligation could theoretically come into play during the E-Rate process.<sup>2</sup> The Petition asks the Commission to make explicit the understandings of the obligation that follow from the plain language, purpose, and structure of the E-Rate rules, the Commission’s E-Rate orders, and the governing statute for the E-Rate program.

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<sup>1</sup> *Petition of United States Telecom Association and CTIA—The Wireless Association® for Declaratory Ruling Clarifying Certain Aspects of the “Lowest Corresponding Price” Obligation of the Schools and Libraries Universal Service Program*, Petition for Declaratory Ruling, CC Docket No. 02-6 (filed Mar. 19, 2010) (“Petition”).

<sup>2</sup> *Id.* at 14-18.

The E-Rate program has already achieved meaningful results in getting schools and libraries connected to the Internet ecosystem, and the program will play a critical role in further expanding the reach of broadband and enhancing the digital literacy of all Americans. Petitioners, together with their members, share the Commission’s goal of enhancing E-Rate to make the program more workable for everyone. As explained in the Petition and as many of the supporting comments affirmed, in order for the E-Rate program to continue to operate effectively and efficiently, everyone—the Commission, the Universal Service Administrative Company (“USAC”), state commissions, applicants, and each of the thousands of E-Rate service providers—must have the same expectations. It is in the interest of *all* stakeholders to know and understand the operative legal framework of the program. To accomplish that important goal, the Commission should grant the Petition and provide the relief requested.

Only one party, the law firm of Shepherd, Finkelman, Miller & Shah, LLP (“Shepherd Finkelman”), opposed the Petition.<sup>3</sup> Besides the blanket, and erroneous, assertion that the Petition lacks legal basis,<sup>4</sup> the Shepherd Finkelman comments nowhere respond to any of the arguments in the Petition that specifically cite to and discuss the E-Rate statute, rules, and orders. To the limited extent that Shepherd Finkelman offers its own views of the law, those views either misstate the law or miss the point entirely.

*First*, Shepherd Finkelman’s assertion that a service provider has a “clear *statutory* duty” to charge the lowest corresponding price<sup>5</sup> is a flat misreading of the statute. Selectively quoting

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<sup>3</sup> Comments of Shepherd, Finkelman, Miller & Shah LLP on Petition for Declaratory Ruling Dated March 19, 2010, WC Docket No. 02-6, at i-ii (May 14, 2010) (“Shepherd Finkelman Comments”). The comments do not disclose on whose behalf they were filed.

<sup>4</sup> *Id.* at i-ii.

<sup>5</sup> *Id.* at 2 (emphasis added).

from Section 254 of the Communications Act, Shepherd Finkelman emphasizes that service providers must charge schools and libraries “rates *less than* the amounts charged for similar services to other parties.”<sup>6</sup> In context, however, it is clear that the quoted passage has nothing to do with the lowest corresponding price obligation. In full, the statute reads:

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.<sup>7</sup>

The sentence in italics makes plain that the quoted passage does not impose a pricing obligation on service providers, but rather establishes the E-Rate “discount” to be set and subsidized by the government. This discount is a 20 to 90 percent federal subsidy for communications services purchased by schools and libraries.<sup>8</sup> Section 254(h) of the Act is not a statutory version of the lowest corresponding price rule in 47 C.F.R. § 54.511(b).

*Second*, Shepherd Finkelman’s claim that the lowest corresponding price obligation applies regardless of whether an applicant receives E-Rate services as a result of a competitive

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<sup>6</sup> *Id.* (quoting 47 U.S.C. § 254(h)(1)(B) and providing emphasis).

<sup>7</sup> 47 U.S.C. § 254(h)(1)(B) (emphasis added).

<sup>8</sup> *See* Universal Service Administrative Company, Schools and Libraries, Overview of the Program, <http://www.usac.org/sl/about/overview-program.aspx>.

bidding process<sup>9</sup> is based on a selective misreading of the Commission’s 1997 *Universal Service Report and Order*.<sup>10</sup> Shepherd Finkelman premises this claim on the FCC’s explanation that the lowest corresponding price obligation applies to “non-competitive markets, as well as competitive markets.”<sup>11</sup> Simply assuming that “non-competitive markets” refers to markets in which no Form 470 or bidding is required, the law firm concludes that the Commission intended the lowest corresponding price obligation to apply even outside the competitive bidding process.<sup>12</sup> Shepherd Finkelman fails to address, however, other aspects of the *Universal Service Report and Order* that undermine its assumption.

The FCC envisioned in the *Universal Service Report and Order* that applicants would always purchase E-Rate services based on competitive bids submitted by service providers. The competitive bidding process underpins the entire E-Rate program and was a significant focus of the Commission’s attention in the E-Rate sections of the *Universal Service Report and Order*.<sup>13</sup> The Commission did not contemplate a situation where an applicant might purchase services outside of a competitive bidding process.<sup>14</sup> The reality today, however, is that applicants make purchases in that manner quite frequently.<sup>15</sup> Sometimes they do so because no provider

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<sup>9</sup> See Shepherd Finkelman Comments 6.

<sup>10</sup> *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776 (1997) (“*Universal Service Report and Order*”).

<sup>11</sup> *Id.* ¶ 485.

<sup>12</sup> See Shepherd Finkelman Comments 6.

<sup>13</sup> See, e.g., *Universal Service Report and Order* ¶¶ 30, 480-83, 487, 575-76.

<sup>14</sup> *Id.* ¶ 480 (“We, therefore, adopt the Joint Board’s finding that fiscal responsibility compels us to require that eligible schools and libraries seek competitive bids for *all* services eligible for section 254(h) discounts.” (emphasis added)).

<sup>15</sup> Petition 16-17.

submitted a bid in response to a Form 470. Other times applicants simply choose, even if they have received bids, to purchase services based on publicly available terms and conditions. The Commission did not indicate in the *Universal Service Report and Order* that the lowest corresponding price obligation applies in any of those circumstances. Nor could it practically apply. When an E-Rate beneficiary receives services based on publicly available terms and conditions (such as wireline services from a tariff or wireless services from a retail store) rather than from a competitive bid submitted by the provider, there often is no practical way for the provider to make pricing or service changes even if the provider is aware that the purchaser is an E-Rate beneficiary, which is not always the case.<sup>16</sup> And in any event, E-Rate beneficiaries, like all customers, ultimately choose for themselves the combination of services and pricing options that best suit their needs.

In fact, the discussion of competitive and non-competitive markets in the *Universal Service Report and Order* relied upon by Shepherd Finkelman plainly assumed that the lowest corresponding price obligation would be a requirement on bids submitted by providers. The Commission explained that, in non-competitive markets “in which there is only one *bidder*, that *bidder’s* lowest corresponding price would constitute the pre-discount price.”<sup>17</sup> And in competitive markets in which there are multiple bidders, the lowest corresponding price would “constitute the ceiling for [any] carrier’s *competitively bid* pre-discount price.”<sup>18</sup> More generally,

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<sup>16</sup> *Id.* at 23.

<sup>17</sup> *Universal Service Report and Order* ¶ 30 (emphasis added).

<sup>18</sup> *Id.* (emphasis added).

the Commission said that the lowest corresponding price obligation would be a requirement on providers “*bidding* to serve a school or library.”<sup>19</sup>

*Third*, Shepherd Finkelman’s frequent references to FCC Form 473<sup>20</sup> miss the point. As the law firm acknowledges, the instructions to Form 473 provide that the general purpose of the form is “to confirm that the invoice forms submitted by each service provider are in compliance with the FCC’s rules governing the schools and libraries universal service support mechanism.”<sup>21</sup> Neither Form 473 nor its instructions, however, shed any light on the issues raised in the Petition. Nothing in those documents provides any guidance regarding what compliance with the lowest corresponding price obligation *actually means*: when in the E-Rate process does the obligation apply, what procedures (if any) are required for compliance, must discrete elements in a service bundle be individually priced and compared, and who bears the burden in a challenge regarding whether a provider’s bid satisfies the lowest corresponding price obligation?

The real point of Shepherd Finkelman’s comments seems to be little more than to level unfounded accusations that some of Petitioners’ members have failed to comply with the lowest corresponding price obligation and are seeking to avoid responsibility for that failure. Of the 26 pages of summary, background, and argument, nearly every page includes an allegation of misconduct or an overwrought claim that the Petition is merely a vehicle to justify that

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<sup>19</sup> *Id.* (emphasis added).

<sup>20</sup> *See, e.g.*, Shepherd Finkelman Comments i, iii, iv, 2, 5, 7, 9, 12.

<sup>21</sup> *Id.* at iii (quoting Instructions to FCC Form 473, *available at* [http://www.usac.org/\\_res/documents/sl/pdf/473i.pdf](http://www.usac.org/_res/documents/sl/pdf/473i.pdf)).

misconduct.<sup>22</sup> Curiously, nowhere among the intemperate charges of false motive and the accusations of “misdirection”<sup>23</sup> is a candid explanation of Shepherd Finkelman’s interest in these proceedings.

Shepherd Finkelman’s allegations are unfounded and the law firm’s supposed outrage is directed at straw men. Shepherd Finkelman offers no evidence whatsoever to support its claims of “fraud”<sup>24</sup> and “knowing[] false certifications.”<sup>25</sup> And the repeated accusations that the Petition seeks to avoid compliance with the lowest corresponding price obligation are based on gross mischaracterizations of the relief sought in the Petition. For example, Shepherd Finkelman asserts that Petitioners are “seeking to allow service providers to ‘lock in’ some contracted price that they believe is favorable . . . without ever having to adjust the contract price to reflect [the lowest corresponding price] at the time of the contract’s renewal.”<sup>26</sup> This is a distortion of Petitioners’ actual request. Nowhere in the Petition is there any suggestion that service providers should simply be permitted to “lock in” a certain price for perpetuity. Instead, the Petition requests a clarification that “the lowest corresponding price obligation is not a continuing

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<sup>22</sup> See, e.g., *id.* at i (“[S]ome of the Petitioners’ members . . . have not complied with the LCP requirement for years.”), ii (“[T]he Petitioners now suggest that the Commission should ignore and effectively write this critical LCP requirement out of the law . . .”), iii (“[Granting the Petition would] giv[e] them free rein to continue overcharging the federal government, schools, and libraries . . .”), iv (claiming that Petitioners “suggest . . . that service providers need not comply with the LCP requirement”), vi (“The Commission should not accept the Petitioners’ invitation to ‘water down’ or effectively write the LCP requirement out of the law . . .”), vii (“For approximately thirteen (13) years, Petitioners and their service provider members . . . repeatedly certified LCP compliance and sought payment from the federal government, despite knowing that their certifications were false.”).

<sup>23</sup> *Id.* at 8.

<sup>24</sup> *Id.* at 5.

<sup>25</sup> *Id.* at 18.

<sup>26</sup> *Id.* at 11.

obligation that entitles a school or library to a *constantly recalculated* lowest corresponding price *during the term of a contract*<sup>27</sup>—a principle that Shepherd Finkelman actually appears to support.<sup>28</sup> As noted in the Petition, any such continuing obligation would be inconsistent with the E-Rate rules and unworkable as a practical matter.<sup>29</sup>

Indeed, the comments are rife with these sorts of mischaracterizations. The Petition also asks the Commission to clarify that “there are no specific procedures that a service provider must use to ensure compliance with the lowest corresponding price obligation.”<sup>30</sup> Shepherd Finkelman recasts this request as an assertion that service providers “have no duty to comply with [the lowest corresponding price obligation] because the Commission allegedly has not made the duty to comply clear or mandatory.”<sup>31</sup> In addition, the Petition asks the Commission to clarify that, “in determining whether a service bundle complies with the lowest corresponding price obligation, discrete elements in such bundles need not be individually compared and priced.”<sup>32</sup> Shepherd Finkelman rewrites this request as a claim that “the bundling of telecommunications services makes it impossible for [service providers] to certify compliance with E-Rate.”<sup>33</sup> Finally, the Petition asks the Commission to clarify that, “in a challenge regarding whether a provider’s bid satisfies the lowest corresponding price obligation, the initial

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<sup>27</sup> Petition 1 (emphases added).

<sup>28</sup> See Shepherd Finkelman Comments 11 (acknowledging that a contract price should be “honored ... throughout the term of th[e] agreement”).

<sup>29</sup> Petition 25-28.

<sup>30</sup> *Id.* at 1.

<sup>31</sup> Shepherd Finkelman Comments 13.

<sup>32</sup> Petition 1.

<sup>33</sup> Shepherd Finkelman Comments 15.

burden falls on the challenger (*i.e.*, a school or library) to demonstrate a prima facie case that the bid is not the lowest corresponding price.”<sup>34</sup> Shepherd Finkelman restates this request as a claim that service providers “are excused from complying with the [lowest corresponding price obligation] ... unless schools and libraries *first* prove that service providers charged them more than [the lowest corresponding price].”<sup>35</sup>

At bottom, the comments of Shepherd Finkelman offer little to the task at hand. Contrary to the law firm’s assertion, there is a pressing need for clarification of the rule. Petitioners and their members have a legal right to seek such legal clarification where necessary. Indeed, the Commission has recognized that “[t]imely guidance [is] important to the efficient and effective administration of the USF programs” and has allowed that “an[y] party ... can file for such guidance at any time.”<sup>36</sup> Moreover, although Shepherd Finkelman directs its most pointed criticism at local exchange carriers (“LECs”),<sup>37</sup> this is a matter with much wider-reaching consequences. The lowest corresponding price obligation applies not just to LECs but to each of the thousands of E-Rate service providers, whose services range from local telephone service to Internet access service to internal connections. It is important to ensure that all of these service providers, as well as the Commission, USAC, state commissions, and E-Rate applicants, have the same clearly defined expectations.

The Commission should grant the Petition and provide the relief requested.

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<sup>34</sup> Petition 1.

<sup>35</sup> Shepherd Finkelman Comments 16 (emphasis in original).

<sup>36</sup> *Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, Notice of Inquiry, 23 FCC Rcd 13583, ¶ 30 (2008).

<sup>37</sup> Shepherd Finkelman Comments 8.

Respectfully submitted,

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Dated: June 1, 2010

## CERTIFICATE OF SERVICE

I hereby certify that, on June 1, 2010, I caused a true and correct copy of the foregoing to be served by electronic mail on the following:

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