

BEFORE THE CORPORATION COMMISSION OF OKLAHOMA

IN THE MATTER OF A PERMANENT)
RULEMAKING OF THE OKLAHOMA)
CORPORATION COMMISSION AMENDING)
OAC 165:59, OKLAHOMA UNIVERSAL)
SERVICE)

CAUSE NO. RM 201400006

COMMENTS OF KELLOGG & SOVEREIGN® CONSULTING, LLC

1. Introduction

Kellogg & Sovereign® Consulting, LLC (KSLLC) on behalf of the schools, libraries and health care providers (HCPs) for which it consults submits these comments on the proposed rules dated October 15, 2014.

KSLLC has been managing federal universal service applications since 1998. Our professional staff works with the FCC's Rural Health Care programs and E-Rate programs on a daily basis on behalf of over 350 clients with annual filing of approximately 650 applications accounting for funding in excess of \$100 million each year. Accordingly, we have an in-depth knowledge and are well versed in all areas of the Federal Communications Commission (FCC) programs administered by the Universal Service Administrative Company (USAC).

KSLLC appreciates the opportunity to provide input to the Oklahoma Corporation Commission ("OCC" or "Commission") on the proposed rule changes to incorporate administrative procedures that have been developed by Commission staff over the past few years. We applaud the Commission for making great strides towards more efficient processing of funding requests, greater transparency, increased oversight, and progress toward data and reporting on funding at the beneficiary level along with greater outreach to program beneficiaries.

The current rulemaking proceeding provides the Commission and stakeholders in the program the opportunity to further refine the program and ensure that goals of special universal service for schools, libraries, and telemedicine will continue to be met to enable access for Oklahomans to education, health care and information resources regardless of rural or economic status.

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II. Background

Beginning in 2011, Kellogg & Sovereign(c) Consulting joined with telemedicine stakeholders¹ in Oklahoma to study the growth of demand on the Oklahoma Universal Services Fund (OUSF) and to make recommendations to the OCC regarding safeguarding the fund for future stakeholders. The working group was called the Oklahoma Telemedicine Advisory Group ("TMAG") which later transitioned to the Telehealth Alliance of Oklahoma. ("TAO").

After two years of comprehensive changes at the OCC in the administration of the Oklahoma special universal services fund, we believe it is appropriate to revisit the recommendations of TMAG submitted to the Commission in comments dated in 2012 in light of the proposed rule changes under CAUSE NO. RM 201400006

The following table lists the recommendations of TMAG and current status:

TMAG Recommendation	Status
Seek Alternate Funding. The most immediate and obvious source of alternative funding is the Universal Service Administrative Company (USAC) Rural Health Care Program, which is governed by the FCC. Our data analysis has shown that requiring eligible Oklahoma health care providers to seek USAC federal funding first will result in a significant savings for the OUSF Telemedicine Fund.	The Oklahoma Corporation Commission updated their rules to require service providers to seek alternative funding first. Rules updates as follows: The eligible local exchange telecommunications service provider requesting OUSF funding for primary universal service shall make every reasonable and timely effort to obtain funding from alternative funding sources designated to support universal service, and shall submit all documentation of the effort to obtain funding from alternative funding sources designated to support universal service as a part of its Request for OUSF funding set forth in subsection (a), or an explanation for why alternative funding is not available. Upon the company providing the documentation that it has sought alternative funding sources or an explanation for why alternative funding is not available, the company shall not be precluded from having its application processed.
Annual Recertification. Entities should annually recertify their eligibility through a form generated and distributed by the Commission. This recertification process offers the Commission a great opportunity to gather valuable information from OUSF recipients, which will be useful in forecasting future growth of the OUSF as well as providing a snapshot of telemedicine capabilities throughout the state. Therefore, the form used	Telemedicine recertification was successfully implemented by the Oklahoma Corporation Commission.

¹ **OKLAHOMA TELEMEDICINE ADVISORY GROUP August 8, 2012:** Deborah J. Sovereign, Jane Kellogg and Ryan Wilson, Kellogg & Sovereign(c) Consulting, LLC, Jonathan Kolarik, Oklahoma Foundation for Medical Quality; Val Schott, Oklahoma Health Information Exchange Trust; Patti Davis, Oklahoma Hospital Association; Brent Wilborn, Oklahoma Primary Care Association; Cynthia Scheideman-Miller and Candace Shaw, Heartland Telehealth Resource Center; Michael Roach, AT&T; Ami Layman, OneNet; Pam Forducey, Micha Post and Anne Roberts, INTEGRIS Health

TMAG Recommendation	Status
<p>for recertification should be as comprehensive as possible. An authorized representative of the eligible health care entity should complete the form, as opposed to the service provider. If the Commission does not have the necessary contact information to distribute the recertification form directly to the healthcare entity, then it may have to employ the assistance of the service provider to notify the entity.</p>	
<p>A formal Funding Year should be adopted for telemedicine certification for OUSF, similar to the timeline used by the federal Universal Services Rural Health Care Program as shown in Figure 1 below.² For the federal program, entities may begin applying when the filing window opens in late March/early April. The actual Funding Year begins on July 1 and runs until June 30 of the next year. July 1 is the first day funding can be committed – any applications received after the beginning of the Funding Year (July 1) are pro-rated from the time they are received until the end of the Funding Year (June 30). For OUSF, the recertification process would take place beginning February 1, 2012 when the recertification forms will be due to the Commission. If an entity were found ineligible for that Funding Year, they would no longer receive funding starting July 1. The annual recertification process fits perfectly into this type of timeline, allowing the Commission an annual review of eligibility prior to the start of the Funding Year.</p>	<p>OCC adopted the funding year of July 1 – June 30 with annual recertification due in February of each year.</p> <p>Letters regarding approval status were issued by OCC in May with an effective date of July of the next funding year.</p> <p>When the FCC's Health Care Connect Fund was released in December, 2012, the OCC aligned the effective date for new rules requiring providers to seek alternate funding first to align with HCF which was available to all eligible HCPs beginning January 1, 2014.</p>
<p>Notifying OUSF recipients of new rules and requirements is of great importance. An eligible entity that is receiving OUSF could very easily miss the recertification process and lose funding for that year. Therefore, there must be a concerted effort to inform all OUSF telemedicine funding recipients of these changes, so they can fulfill all requirements in a timely manner and avoid possible disruptions to patient care. As previously stated, it may be necessary to enlist the assistance of service providers to notify healthcare entities until the Commission obtains contact information for the OUSF telemedicine funding recipient</p>	<p>OCC provided extensive outreach to telemedicine providers and enlisted the assistance of service providers to notify health care entities of the recertification requirement.</p>

² <http://www.usac.org/res/documents/rhc/pdf/handouts/Primary-Program-Timeline.pdf> (4/1/2012)

TMAG Recommendation	Status
healthcare entities	
<p>All entities receiving OUSF should be required to participate in a bid process. Entities that are eligible for federal funding will participate in the competitive bidding process as required by the federal Universal Services Rural Health Care Program.</p> <p>Entities that are not eligible for the federal Universal Services Rural Health Care Program should also be required to engage in a bid process. Entities should be required to provide their procurement policy to the Commission, as well as documentation that proves the procurement policy was followed and a bid process was utilized in the selection of a service provider. This information should be provided at the time of annual recertification.</p>	<p>With the 2014 rulemaking, the OCC is seeking to implement competitive bidding requirements for entities receiving OUSF.</p>
<p>Data reporting by entity. The annual recertification form will significantly improve the data available concerning the OUSF Telemedicine Fund. All necessary demographic information will be obtained at the point of recertification. In terms of data reporting, the end goal is the ability to sort and analyze OUSF recipients by every metric. A few examples include the ability to determine funding at the individual entity level, provider type (FQHC, hospital etc.), by type of service and bandwidth, and by service provider.</p>	<p>OCC contracted with a new data processing company to manage data reporting and provide OCC with entity level information.</p> <p>The reporting is currently only available to Commission staff.</p>
<p>Quarterly Disbursements Reports. Additionally, the Commission should consider issuing quarterly summary reports to OUSF recipients. During our communications with OUSF telemedicine fund recipients, TMAG found that many recipients were not aware of the funding they were receiving for telemedicine support. Quarterly disbursement reports issued to the recipient of OUSF funding including not only telemedicine support but also schools and libraries will provide notification to the end user of amounts disbursed on their behalf to the service providers.</p>	<p>Commission staff have recently made public a table providing status of current causes (orders) being reviewed by the OCC for approval of OUSF funding.</p> <p>Fund recipients still do not receive reporting from the Corporation Commission of funding disbursements made on behalf of the beneficiary school, library, or telemedicine provider.</p>
<p>The following recommendation was included in reply comments dated September 2012:</p>	
<p>Recommended using bandwidth levels listed in the FCC's National Broadband Plan to determine if a requested bandwidth is congruent with industry standards.</p>	<p>OCC staff adopted the use of the FCC's National Broadband Standards as a starting point in analyzing reasonableness of bandwidth requests for health care providers.</p>

We included the above list to remind all stakeholders of the significant changes that have taken place at the OCC in regards to the administration of the special universal services fund commonly known as the Oklahoma Universal Services Fund ("OUSF"). The Commission staff has worked diligently to listen to comments and make changes accordingly.

We are concerned with the recent change in focus from the items that have made significant positive changes in the program over the past two years to the implementation of the "in the Public Interest Clause" that was added by legislation in November 2012. We believe that the Commission's intent is to guard the program from waste, fraud and abuse but in implementation of requiring a different standard for competitive bidding than the federal FCC programs, unintended consequences are being realized by not only telemedicine providers but also schools and libraries.

Our recommendation is that the Commission adopts the competitive bidding requirements already in place for both the FCC's E-Rate Program as well as the FCC's Rural Health Care Programs including the telecommunications program and the Health Care Connect Fund.

In the Oklahoma Hospital Association's Comments filed October 21, 2014, OHA clearly described the FCC's competitive bidding methodology and stated OHA's support of adopting the FCC competitive bidding rules for telemedicine causes for OUSF support. We fully support OHA's comments and recommendations.

Since the Oklahoma Corporation Commission (OCC) reviews applications for support from the Oklahoma Universal Services Fund (OUSF) well after competitive bidding has been conducted, contracts signed, and service providers awarded, it is our recommendation that the OCC rely on competitive bidding that has already been completed by the school, library, or health care provider and approved by the USAC Program Integrity Review as part of the FCC's programs. For those OUSF recipients who are not currently participating in one of the FCC programs, the Commission should indeed require a competitive bidding period which also follows the rules promulgated by the FCC.

We have provided various scenarios and explanations below which we believe should be helpful for the Commission in understanding the undue financial burden and unintended consequences of creating a competitive bidding standard at the state level that is different than the requirements of the federal programs.

III. Bidding Criteria.

We recommend that the Commission adopt criteria already established by the FCC programs.

The following excerpt is the Oklahoma Corporation Commission (OCC) proposed rule 165:59-7-1 Procedures for requesting funding from the OUSF:

(e) The Commission will utilize the following procedures when evaluating a request for OUSF funding:

- (1) Competitive bidding should be used for all services where OUSF funding will be sought. A copy of all bids for services must be provided by the end-user to the OUSF Administrator, along with documented review of all service alternatives considered by the end-user. The end-user shall provide a written explanation detailing the underlying reason for the selection of a bid which does not represent the least cost alternative. Funding from the OUSF may be limited to recovery of the least cost option; provided the last cost option appears to be for reliable service that will meet the stated needs of the school, library or telemedicine recipient. In the event a competitive bid was not available, documentation of pricing for similar services to non-OUSF end-users of the carrier in similar geographic areas will be required to be provided. Such documentation will be used in determining reasonableness of rates.

The Commission has not previously implemented bidding requirements.

Specifically for schools, there are no requirements in state of Oklahoma education law that require competitive bidding other than for construction projects over \$50,000.

We agree that competitive bidding should be required of all recipients of special universal service funds. However, to require separate standards at both the federal and state level creates an undue hardship on all parties involved.

When Commission staff began to revise their administrative procedures regarding application review for funding, one of the concerns was how to determine whether or not the cost was reasonable. How do you determine what is reasonable? How do you ensure that applicants are only requesting services needed and valuable funding is not wasted on oversubscribed services?

The Commission began working through review of current funding by requiring recertification of telemedicine program beneficiaries in February, 2013. Results of the recertifications are not publicly available, but staff indicated that the certification process resulted in denial of funding for telemedicine applicants who had duplicate services and ineligible sites. Reductions in funding were also made for telemedicine beneficiaries whom did not have sufficient equipment to support the bandwidth levels requested. Commission staff did not have a methodology to use regarding reasonable cost, however, so further analysis was done regarding the best method to ensure funds were approved only within the Public Interest effective November 1, 2012.³

“E. The Corporation Commission shall have authority to investigate and modify or reject in whole or part a Special Universal Services request under subsection C of this section if the request does not meet the specified criteria, if the Corporation Commission's investigation determines that the entity has not provided sufficient justification for the

³ 17. O.S. 2011, Section 139.109 (E) amended November 11, 2012.

requested services, or if the Corporation Commission determines that granting the request is not in the public interest.”

The “in the Public Interest” clause grants very broad power to the Corporation Commission to approve, deny, or reduce a request for support from the OUSF. This one sentence has caused great consternation in the stakeholder community especially since the term is so broad and can be interpreted in various ways.

The public interest test needs further definition to protect the goals of the program which by definition will pay for costs for services that the school, library or health care provider could not otherwise afford.

It is in the public interest to ensure that affordable access is provided to schools, libraries, and health care providers by leveraging the Oklahoma Universal Services Fund to offset the high cost of broadband in rural areas.

The public interest test also needs to guard the fund from waste, fraud and abuse to ensure that the funds entrusted by the payers in Oklahoma will be used wisely to meet the goals of the program.

These two interests of providing affordable access while at the same time guarding against waste, fraud and abuse, require that the Corporation Commission develop procedures promulgated in the rules that will provide clear guidance to both the participants in the fund as well as the administrators of the fund.

1. Schools and Libraries

Building Cap

The costs supported by OUSF associated with schools and libraries are commonly referred to as the “building cap.” The building cap is currently determined as follows:

“Each public school building wherein classrooms are contained and each public library in the state shall, upon written request, receive one access line, free of charge, with the ability to connect to an Internet service provider at 1.5Mbps, in the most economically efficient manner for the carrier, or an equivalent dollar credit to be applied by the public school or public library toward similar services provided by the same carrier, for the purpose of accessing the Internet.”⁴

⁴ 17 O.S. § 139.109 (C)(4)

For schools or libraries, the statute does not provide the ability for the Commission to approve paying for any more than the cost of the 1.54Mbps ("T-1") or equivalent credit. Therefore, for schools and libraries the fund is guarded from over-spending by the fact that the Commission cannot provide funding for any more than the approved building credit.

E-Rate is first payer

Additionally, for schools and libraries, the costs are offset up to 90% by funding received from the FCC's universal services support mechanism for schools and libraries commonly referred to as the "E-rate Program." The E-rate Program is the "first payer" which means that costs incurred for Internet Access and wide area network connections first receive funding from the federal program. The remainder of eligible costs⁵ is then paid for by the state fund.

Example; School A has a 10 Mbps Internet Access service costing \$2,000/month and a wide area network connecting their 3 school buildings with classrooms costing \$1,000/month. Assuming that the service provider's cost of providing a T-1 is \$500/month. The OUSF maximum building credit would be $\$500 \times 3 = \$1,500/\text{mo}$. If the school receives an 80% discount from E-rate, the federal E-Rate program will first fund 80% of the total cost or \$2,400/month ($\$2,000 \text{ plus } \$1,000 = \$3,000 \times 80\%$). The remaining \$600/month ($\$3,000 - \$2,400$) would be paid by OUSF. In this example, the OUSF would have paid a total of \$1,500 per statute, but only \$600 was needed from the state fund since the school was able to leverage funding from the federal program.

Note also that the E-rate Program requires that the school pay for their non-discount share. Payment can come from the school's local funds, grants, state funds, or other funding sources as long as not paid for by the service provider.

Oklahoma legislators and stakeholders recognize need for higher bandwidth

The building credit was originally set at the cost of a 56K line or equivalent credit. The 56K level was established when the fund was first implemented. By 2012 when the "building credit" was increased by legislation, the bandwidth needed by schools and libraries had increased to an average of 10 Mbps with larger school districts and library systems using speeds of 100 Mbps or greater. In 2014, for example, both Tulsa Public Schools and Oklahoma City Public Schools are using Internet Access speeds in excess of 1 Gbps.

The ConnectEd initiative supported across the United States by SETDA⁶ and used as a guide by the FCC in the FCC's E-Rate Modernization Order⁷ states that in order to meet the educational needs of America's students, schools must have a minimum of 100 Mbps of Internet Access for every 1,000 students by

⁵ Services eligible for OUSF support are not the same as services eligible for support from the E-Rate program. For example, OUSF does not support costs for a managed router, Internet maintenance fees, and other fees associated with the service. Beginning November, 2013, the Oklahoma Corporation Commission requires participants to certify that they understand the fund does not cover all costs. OAC165:59-7-17, the provider of Internet service must provide written information notifying the school prior to signing a contract that the OUSF may not fund the entire amount of the Internet services after E-Rate and OUSF credits are applied. If such is the case, the school district will be responsible for any remaining amount.

⁶ <http://www.setda.org/priorities/equity-of-access/the-broadband-imperative/> [accessed October 26, 2014]

⁷ Modernizing the E-rate Program for Schools and Libraries, WC Docket No. 13-184, Order, FCC 14-99 (rel. Jul. 23, 2014)(E-rate Modernization Order).

2015 and 1 Gbps of Internet Access for every 1,000 students by 2020. Additionally, wide area networks used to connect school buildings need to have a minimum of 1 Gbps bandwidth by 2015 and 10 Gbps bandwidth by 2020. These standards far exceed the 1.5 Mbps building cap currently provided by the Oklahoma Universal Services Fund.

For Oklahoma's students to succeed, it is certainly in the public interest to provide the minimal support of the building credit funded by the Oklahoma Universal Services Fund (OUSF). By increasing the credit from 56K to 1.54Mbps, Oklahoma's legislature provided some relief to schools and libraries who are leveraging federal, state, and local funds to find ways to afford sufficient access in order to meet the ever-increasing needs of Oklahoma's students and library patrons to access resources only available via the Internet.

Timing of Bid Evaluation and Bid Award – PRIOR to start of service

In order to receive funding from the E-rate Program, a school or library ('applicant') must conduct at a minimum a 28-day fair and open competitive bidding process. This process must take place prior to the filing of the FCC Form 471 which is the form used by the E-rate Program to apply for funding support.

The FCC Form 471 may be filed during the "Filing Window" which usually runs from January – March prior to the beginning of the funding year. For example the funding year for FY2014 started July 1, 2014. The Form 471 window opened in January, 2014 and closed March 26, 2014.

If an Oklahoma school or library intended to receive E-rate funding for the 2014-15 year, they would have had to conduct a competitive bidding process and select a service provider several months before services started July 1, 2014.

Since schools and libraries are constantly upgrading bandwidth to meet their educational and informational needs, the schools and libraries are making decisions to enter into contracts with service providers for these services that they cannot otherwise afford without support from both E-rate and OUSF. The decisions to contract are being made several months before services start. Contract language usually states that services are conditional upon E-rate funding, but as school start dates and library needs escalate, schools and libraries are often forced to start services prior to funding.

OUSF review of applications is AFTER services start - as late as 18 months before beginning review. Separate standards for determining reasonable cost with reductions in funding below building credits can result in an unintended financial burden on schools and libraries.

With the exception of the pre-approval process, OUSF funding requests are submitted AFTER services start. The OCC will review requests for funding submitted by a service provider up to 18 months after services started. This delay in review and subsequent approval of funding is detrimental to any organization's operating budget.

The beneficiary of OUSF funding, the school or library, has no control over when the service provider submits the request for funding from the OUSF on their behalf.

Since the determination of OUSF funding support is well after the competitive bidding period and bid award as well as after services start and as late as years after services ended, any reduction in expected support becomes seriously problematic.

Pre-Approval process is not timely in order to align with E-Rate filing period

The Pre-Approval procedures of the OCC allow for an end-user to ask their service provider to submit a pre-approval cause with the OCC. According to Commission staff, this process will take a minimum of 90 days.

The pre-approval process is unfortunately not aligned with the E-rate filing period. The school or library who would most likely request pre-approval would be a situation where the school or library had already completed the competitive bidding period to find that the costs to upgrade bandwidth to meet the educational or informational needs of the school or library were much higher than expected. The school or library would need to submit the bids received to the commission and would need to select only one provider for pre-approval. If the Commission took the full 90 days and did not recommend approval, the school or library would be out of time to request review of another bid since the service provider for the second option would need to then submit for pre-approval. Additionally, if the applicant is submitting for pre-approval during the E-rate filing process, they would miss the deadline to apply for E-rate since the E-rate filing window itself is usually less than 90 days. The filing window for 2014-15 for example started in January 9th and ended March 26, 2014 for a total of 77 days.

THE FOLLOWING IS AN EXAMPLE ONLY. THIS IS NOT BASED ON AN ACTUAL CAUSE WITH THE OCC.

Example: School A conducts a needs assessment and determines they need to upgrade from 2 T-1s or 3 Mbps of Internet Access costing \$1028/month to 10 Mbps Internet Access. The school has 4 buildings with classrooms.

Due to the fact that the school is located in a rural, remote area, the cost of providing the 10Mbps service is much more expensive than in the urban areas or even the neighboring county that has a Department of Defense facility so fiber was already built out to the community.

School A conducts a competitive bidding process in January, 2014. The cost of the 10Mbps service comes in very high in the Superintendent's opinion, at \$6,500/month. The superintendent asks the service provider for their "T-1 rate" so he can determine the support he will receive from OUSF which would cover the school's non-discount share (amount not paid by E-rate). The provider notifies the school that their T-1 rate is \$300/month. So he determines the OUSF support will be a maximum of \$1,200/month.

The school reviews the bid amounts provided by the provider and determines as long as E-rate pays 80% of the cost or \$5,200/month, OUSF will pay \$1,200/month and the school will pay the remainder of

\$100/month. The school board approves the contract and approves the budgeted amount of \$1,200 for their costs for the year.

The school selects the service provider in February 2014. Signs contracts in February 2014 and submits their application for E-rate funding in March 2014. E-rate reviewers review the competitive bidding documentation and contract and issue funding commitment decision letter in August, 2014. School A installs upgraded Internet Access services in September 2014.

School A's service provider gathers documentation from the school and submits funding request to OUSF in June, 2015. OUSF follows a 90-day processing period and finishes review September, 2015. OUSF notifies the provider that costs were determined to be unreasonable and the support expected by the school will be decreased to match the rate of the services for a 10Mbps circuit provided to the school district in the neighboring county of \$2,000/month. The analyst had carefully reviewed the facts of the case and believed that the decision the Superintendent made was unreasonable. Even though the T-1 building credit was \$1,200/month, the analyst decided to reduce support to \$400/month (\$2,000/month less 80% E-rate = \$400/month).

The service provider in this example would only receive \$400/month from the OUSF instead of \$1200/month. Since the school's fiscal year had ended, the school would have to charge back to the taxpayers in the school district the \$9,600 that the Superintendent and school board had expected from OUSF support. Since the OCC decision was made after the contracts had been signed and the school year had ended, there was no alternative course of action for the school district.

This is an example only but is included to show the unintended consequences of using a different reasonable cost standard than that used by the E-rate Program which is exacerbated by the delay in review.

Certainly, if the Superintendent had known there would be a problem with the approval of the OUSF building credit, he could have requested pre-approval and waited to start the upgraded service when he knew whether or not the service would be approved. The problem lies, however, in that the Superintendent would have no reason to believe the OUSF support would not be available since he was only requesting from OUSF the minimal amount provided within the building credits per statute.

Another unintended consequence would occur if the school district does not have a way to pay for the additional \$9,600. E-rate Program rules require that the applicant pay their non-discount share. If the applicant does not pay their non-discount share, then they would be in direct violation and the FCC program would require repayment of the entire amount funded by E-Rate of \$62,400 for a total repayment of \$78,000.

The savings to the OUSF would be \$9,600 but the costs to the school district and stakeholders in the program would most likely far exceed the \$9,600 savings. The district Superintendent and school board would be fearful of making this decision again in the future and most likely will limit bandwidth well below the speeds needed meet the educational needs of the district. The district will incur extensive "man hours" and costs in defending their selection of the 10 Mbps service as the most cost effective solution under the FCC's rules, cost of hiring an attorney to defend the applicant's interests with the service provider who will require repayment and termination fees, costs of the school to hire an attorney to process the charges back to the taxpayers since the fiscal year had closed, and

administrative costs on the Corporation Commission staff to defend their decision that the choice made by the Superintendent and school board were not in the public interest.

If the district was not able to pay the provider for E-rate the non-discount share, costs will also include time writing appeals to the FCC, costs incurred in paying back the FCC for commitment adjustments, attorneys' fees and consultant costs for representation of the district with the FCC, and other intangible costs and undue hardship on the district's administrative staff. This does not include costs incurred by the Commission's administrative staff on further researching the reasonableness cost issue, orders for reconsideration, administrative law judge costs, court costs, and other costs incurred.

The Commission certainly does not intend to create a situation such as detailed above however,, creating a separate standard from that of the FCC programs could result in unintended undue financial hardship on the beneficiaries that the program is designed to support.

Changes in services and providers limited after governing board and E-rate approval

If an entity's selection for OUSF support is considered unreasonable by the PUD Analyst, the school or library has no choice but to pay in full for the amount denied. Due to compliance with E-rate rules regarding service provider changes and service substitutions, only limited changes are allowed during the E-rate program year. Additionally no changes can be made once the E-rate invoicing deadline has passed.

The governing boards for the entities must follow their local procurement rules and can make changes to contracts and service agreements after approval only in rare instances. Once service providers incur costs to install and implement funded services, the recipient of the service is legally obligated to pay for the contracted services. Both schools and libraries must follow state law in issuing contracts, receiving services, and meeting obligations within the fiscal year.

Procurement policies and procedures are very rigid due to the use of taxpayer monies at all levels of the school or library operations.

Rules for the E-rate Program including competitive bidding rules, changes in providers, and changes in services are detailed in Title 47 of the Code of Federal Regulations, Chapter I, Subchapter B, Part 54, Subpart F - §54.503.⁸

Service Substitutions – Changes in Service are allowed during the funding year under limited circumstances.

⁸ <http://www.ecfr.gov>

§54.504 Requests for services.

(d) *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.

Service Provider Changes – Changes in the service provider can be made prior to the invoicing deadline and can only be made in very limited circumstances. For purposes of the E-rate Program, once a contract for products or services is signed by the applicant and service provider, the applicant may not change to a different service provider unless (1) there is a legitimate reason to change providers (e.g., breach of contract or the service provider is unable to perform); and (2) the newly selected service provider received the next highest point value in the original bid evaluation, assuming there was more than one bidder.

Competitive Bidding Rules – We have provided excerpts below from 47 CFR. However, we recommend that the OCC use language in the Chapter 59 rules to reflect that the Corporation Commission will approve requests as long as the services were competitively bid. Note that the FCC uses not only the competitive bidding evaluation of the applicant but also enforces that the service provider is using the Lowest Corresponding Price.

§54.511 Ordering services.

(a) *Selecting a provider of eligible services.* Except as exempted in §54.503(e), 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 must select the most cost-effective service offering. In determining which service offering is the most cost-effective, entities may consider relevant factors other than the pre-discount prices submitted by providers, but price should be the primary factor considered.

(b) *Lowest corresponding price.* Providers of eligible services shall not submit bids for or 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.

Controlling Costs of Schools and Libraries – Competitive Bidding Requirement

The FCC is the first payer which by definition gives relief to the Oklahoma fund which only needs to provide support after federal funding is applied to the costs.

In Spring 2014, the Commission requested that schools and libraries who received support from the Oklahoma Universal Services Fund (OUSF), provide information regarding their competitive bidding documents required by the FCC's E-Rate Program.

Even though the OUSF does not have a competitive bidding requirement, the Commission staff reviewed the documentation voluntarily provided by the schools and libraries to determine whether or not the schools and libraries had selected the most reasonable cost provider.

During the review of bid documentation, the Commission identified a small number of cases in which, in the opinion of the PUD analyst, the costs were considered unreasonable and not in the public interest. The Commission staff worked diligently to understand the methodology used by the school or library in making their bid selection and compared the stated methodology with the competitive bidding requirements of the E-Rate program.

We agree with the Commission's desire to control costs and set a reasonable cost standard for purposes of the OUSF. However, due to the fact that OUSF reviews applications of schools and libraries **after** approval by the governing board, approval of contracts, start of service, and in some cases well after the school or library's fiscal year has ended, **the reduction in funding below eligible building credits requested by the school district creates undue financial hardship and unintended consequences.**

2. Telemedicine.

We fully support the comments filed October 21, 2104 by the Oklahoma Hospital Association. OHA clearly described the FCC's competitive bidding methodology and stated OHA's support of adopting the FCC competitive bidding rules for telemedicine causes for OUSF support.

The following except is the Oklahoma Corporation Commission (OCC) proposed rule 165:59-7-1 Procedures for requesting funding from the OUSF:

(e) The Commission will utilize the following procedures when evaluating a request for OUSF funding:

- (2) Competitive bidding should be used for all services where OUSF funding will be sought. A copy of all bids for services must be provided by the end-user to the OUSF Administrator, along with

documented review of all service alternatives considered by the end-user. The end-user shall provide a written explanation detailing the underlying reason for the selection of a bid which does not represent the least cost alternative. Funding from the OUSF may be limited to recovery of the least cost option; provided the last cost option appears to be for reliable service that will meet the stated needs of the school, library or telemedicine recipient. In the event a competitive bid was not available, documentation of pricing for similar services to non-OUSF end-users of the carrier in similar geographic areas will be required to be provided. Such documentation will be used in determining reasonableness of rates.

- (21) Any additional service above and beyond the telemedicine line on contracts and invoices will be denied, unless good cause is shown for reasonable pricing and public interest. Invoices provided to request recovery from the OUSF must contain a breakdown of non-eligible expenses, such as Quality of Service product, firewall, email packages, domain registration, etc.

The Federal Communications Commission (FCC) has held that the least cost alternative is not appropriate an appropriate standard for rural health care providers to use when choosing a service provider. In the *Pilot Program Selection Order*⁹ the FCC explained at length why the lowest cost alternative is not an appropriate standard for rural health care providers:

Consistent with existing rules and requirements, selected participants must comply with the competitive bidding process to select a service provider for their proposed projects. As part of this requirement, we reiterate that each selected participant is required to certify to USAC that the service provider it chooses is, to the best of the applicant's knowledge, the most cost-effective service or facility provider available. The Commission has defined "cost-effective" for purposes of the existing RHC support mechanism as "the method that cost the least after consideration of the features, quality of transmission, reliability, and other factors that the health care provider deems relevant to choosing a method of providing the required health care services." In selecting the most cost-effective bid, in addition to price, we require selected participants to consider non-cost evaluation factors that include prior experience, including past performance; personnel qualifications; and environmental objectives (if appropriate). The Commission has previously concluded that non-price evaluation factors, such as prior experience, personnel qualifications, and management capability, may form a reasonable basis on which to evaluate whether a bid is cost-effective....¹⁰ (emphasis added)

The FCC went further and stated that:

⁹ *In the Matter of the Rural Health Care Support Mechanism*, WC Docket 02-60, Order, FCC 07-198, 22 FCC Rcd 20360 (2007) (*Pilot Program Selection Order*).

¹⁰ *Id.* ¶ 78

The existing RHC support mechanism, unlike the schools and libraries universal service support (E-Rate) program, does not require participants to consider price as the primary factor in selecting service providers. **The Commission has stated that applicants to the RHC support mechanism should not be required to use the lowest-cost technology because factors other than cost, such as reliability and quality, may be relevant to fulfill their telemedicine needs. This rational remains appropriate for the Pilot Program. Thus, selected participants are not required to select the lowest cost bid offered, and need not consider cost as the sole primary factor in selecting bids for construction of their broadband networks and the services provided over those networks. ... In developing a telemedicine network infrastructure, selected participants may find non-cost factors to be as or more important than price.** [emphasis added] for example, selected participants may find technical excellence and personnel qualifications particularly relevant in determining how best to meet their health care and telemedicine needs. Requiring applicants to use the lowest cost technology available could result in selected participants being relegated to using obsolete or soon-to-be-retired technology. In addition, initially higher cost options may prove to be the lower in the long-run, by providing useful benefits to telemedicine in terms of future medical and technological developments and maintenance. Thus, we do not require selected participants to make price the sole primary factor in bid selection, but it must be a primary factor.¹¹

The Healthcare Connect Fund, established by the FCC in 2012, based upon the success of the Pilot Program.¹² The competitive bidding requirements for Healthcare Connect Fund participants requires the following¹³:

- The submission of the FCC Form 461, requesting service.
- Network Plan (for consortium applicants)
- Bid Evaluation (selection criteria)¹⁴
- Declaration of Assistance, listing all individuals who assisted in the development of the FCC Form 461, Network Plan (if applicable) and Request for Proposals¹⁵
- Request for Proposals (RFP) (if applicable)

The FCC requires that participants submit an RFP if:

- If it is required to issue an RFP under applicable State, Tribal, or local procurement rules or regulations;
- If the applicant is a consortium seeking more than \$100,000 in program support during the funding year, including applications that seek more than \$100,000 in program support for a multi-year commitment; or,

¹¹ *Id.* ¶ 79

¹² *In the Matter of Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, FCC 12-150, 27 FCC Rcd 16678 ¶ 2 (2012) (*Healthcare Connect Fund Order*. (Today's reform builds on the success of the RHC Pilot Program)

¹³ Complete competitive bidding rules for the Healthcare Connect Fund can be found at 47 C.F.R. § 54.636, 54.638, and 54.642.

¹⁴ See FCC Form 461, Block Five

¹⁵ See FCC Form 461, Block Four

- If the applicant is a consortium seeking support for participant-constructed and owned network facilities.¹⁶

Applicants submit the FCC Form 461 and supporting documentation to USAC for review. Once reviewed, USAC posts the Form 461 and support documentation on its website.¹⁷ Applicants are required to post for a minimum of 28 days, but can choose to post for a longer period of time.¹⁸ Applicants are further required to conduct a “fair and open” competitive bidding process. The FCC has set forth three basic principles concerning conducting a “fair and open” competitive bidding process:

- (1) Service providers who intend to bid should not also simultaneously help the HCP choose a winning bidder. More specifically, service providers who submit bids are prohibited from (a) preparing, signing, or submitting an applicant’s Form 461 documents; (b) serving as Consortium Leaders or other points of contact on behalf of applicants; (c) being involved in setting bid evaluation criteria; or, (d) participating in the bid evaluation or vendor selection process (except in their role as potential vendors).¹⁹
- (2) All potential bidders and service providers must have access to the same information and must be treated in the same manner. Any additions or modifications to the documents submitted to, and posted by, USAC must be made available to all potential service providers at the same time and using a uniform method.²⁰
- (3) All applicants and service providers must comply with any applicable state and local competitive bidding requirements.²¹

The FCC’s competitive bidding requirements are very stringent and are intended to, in part, prevent waste, fraud and abuse in the universal service fund. Applicants are required on the FCC forms to certify that they are compliant with the FCC competitive bid requirements.²²

We encourage the OCC to adopt the FCC’s standard of choosing the “most cost-effective” service provider. The OCC currently does not have a uniform method by which applicants to the OUSF can seek competitive bids, or a requirement for how long applicants must seek competitive bids. The FCC program uses a standard form, requires a “fair and open” competitive bid process and requires the filing of a formal RFP for consortium applicants.²³ FCC rules specifically **require** that the applicant consider evaluation criteria other than cost.²⁴

¹⁶ 47 C.F.R. § 54.642(e)(4)

¹⁷ See USAC website to access posted services <http://www.usac.org/rhc/healthcare-connect/tools/search-posted-services/default.aspx> (last visited October 24, 2014).

¹⁸ *Healthcare Connect Fund Order* ¶ 246 “Applicants are free to extend the time period for receiving bids beyond 28 days from the posting of Form 461 and may do so without prior approval. In addition, some applicants who propose larger, more complex projects may wish to undertake an additional “best and final offer” round of bidding.... If an applicant has plans to utilize a period longer than 28 days, it should indicate clearly on the Form or in accompanying documentation. An applicant that decides to extend the bidding period after USAC’s posting of Form 461 should notify USAC promptly, so that USAC can update its web site posting with notice of the extension.”

¹⁹ *Id.* ¶ 231

²⁰ *Id.* ¶ 232.

²¹ *Id.* ¶ 233.

²² 47 C.F.R. § 54.643(2)(ii) “Each vendor selected is, to the best of the applicant’s knowledge, information, and belief, the most cost-effective vendor available, as defined in § 54.642(c)”.

²³ USAC recommends that all consortium applicants use an RFP. See <http://www.usac.org/rhc/healthcare-connect/consortia/step04/default.aspx> (last visited October 24, 2014). In our experience, most consortium

The OCC rules allow for consideration of reliability as a factor in choosing a service provider, but does not specifically allow for any other consideration. The OCC rules also require that the applicants seek alternative means of funding, resulting in the applicants being required to participate in both the federal and state programs to receive funding for their broadband connections. It is unreasonable to have two different standards for competitive bidding, one where cost is not the most important factor and a completely different standard where cost is the most important factor.

It is likely that applicants will find themselves in a position where they are compliant with one program's rules and not the other. Because the OUSF will pay the entire cost of the connection upon a showing that the applicant did seek alternative funding and its choice of service provider was the "least cost alternative", applicants have an incentive to ensure that they can receive funding for 100% of their service compared to just 65% funding that they would receive solely from the federal program.

This is counter to the goal of the OCC to reduce expenses in the OUSF by requiring applicants to first seek alternative methods of funding. To optimize federal funding for Oklahoma health care providers **and** reduce expenses for OUSF, the OCC should adopt the same "most-cost effective" rule for competitive bidding purposes.

applicants will meet the \$100,000 threshold in a single funding year and thus is required by the FCC rules to use an RFP to seek competitive bids.

²⁴ 47 C.F.R. § 54.642(c)-(d)

IV. Recommendations.

For the reasons listed above, we recommend the following language instead of the wording in the proposed rule changes as follows:

165:59-7-1. Reimbursement from the OUSF for Special Universal Service

(e) The Commission will utilize the following procedures when evaluating a request for OUSF funding:

(1) Competitive bidding should be used for all services where OUSF funding will be sought. Certification of compliance with the FCC's competitive bidding requirements must be provided by the end-user to the OUSF Administrator.

In the event the end-user cannot certify compliance with FCC's competitive bidding requirements, a copy of all bids for services must be provided by the end-user to the OUSF Administrator, along with a documented review of all service alternatives considered by the end-user. The end-user shall provide a written explanation detailing the underlying reason for the selection of a bid which does not represent the most cost effective solution. Funding from the OUSF may be limited to recovery of the most cost effective solution provided that the most cost effective solution is for reliable service that will meet the stated needs of the school, library or telemedicine recipient.

Service Providers must also certify that charges are not priced above the lowest corresponding price for supported services, unless the Commission 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.

Furthermore, we recommend striking the following language.

~~(2) The OUSF will fund the lowest reasonable cost for internet access to schools and libraries for the balance not paid by E-Rate, up to the eligible 1.5 Mbps building credit equivalent.~~

Other Recommendations:

We agree with comments made by OHA that the administrative procedures within the rules need to be separated where applicable among schools, libraries and health care providers.

We recommend that the OCC implement quarterly disbursement reports similar to those provided by the E-Rate program so that end-users will be aware of OUSF funding disbursements made on their behalf. End-user reporting will allow greater transparency in the program and give end-users the information they need to provide oversight on the funding received on their behalf.

We also recommend that the OCC implement procedures to ensure compliance with the requirements to seek alternate funding first. During TMAG's 2012 analysis, we determined that the fund would save approximately 25% of the costs associated with telemedicine support by requiring telemedicine providers to seek alternate funding. With the advent of the Health Care Connect Fund, our original estimate may be even greater since the HCF provides support at 65% of the cost of eligible services. The current administrative procedures are lacking enforcement of this requirement.

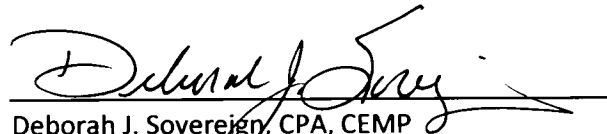
V. Conclusion

Oklahoma has been a leader in Pre-K education, one of the first to successfully implement telemedicine and we take pride in our "Sooner" heritage. We took the lead in the early years of E-rate to take full advantage of the federal funding and implemented special universal services at the state level to assist schools, libraries, and health care providers with the costs not paid for by the federal USF.

It is critical in this rulemaking to understand the goals of Oklahoma's special universal services program and the years of progress our state has made in meeting the program goals to connect our schools, libraries and health care providers to online resources at speeds necessary to meet our educational, informational, and health care needs.

We appreciate the hard work, dedication and attention the Oklahoma Corporation Commission has given to the success of the Oklahoma Universal Services Fund, and we appreciate the consideration of our comments which are offered with a mutual intent to meet the goals of the program while protecting the fund against waste, fraud and abuse.

Respectfully Submitted,



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CERTIFICATE OF MAILING

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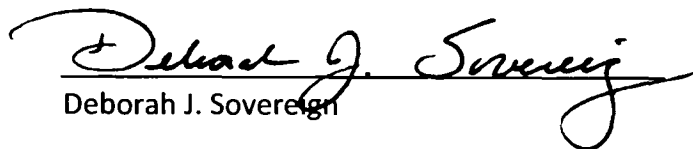
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