the tolerances and specify how compliance with the tolerances is to be measured. The revised tolerance expression makes clear that the tolerances cover residues of the fungicide metrafenone, including its metabolites and degradates, but that compliance with the specified tolerance levels is to be determined by measuring only metrafenone (3-bromo-6-methoxy-2-methylphenyl)(2,3,4-trimethoxy-6-methylphenyl)methanone in or on the commodities.

V. Conclusion

Therefore, tolerances are established for residues of metrafenone, (3-bromo-6-methoxy-2-methylphenyl)(2,3,4-trimethoxy-6-methylphenyl)methanone, in or on grape at 4.5 ppm and grape, raisin at 17 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 24, 2010.

Steven Bradbury,

Director, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.624 paragraph (a) is revised to read as follows:

§ 180.624 Metrafenone; tolerances for residues.

(a) *General.* Tolerances are established for residues of the fungicide metrafenone, including its metabolites and degradates, in or on the commodities in the table below. Compliance with the tolerance levels specified in the following table is to be determined by measuring only metrafenone (3-bromo-6-methoxy-2-methylphenyl)(2,3,4-trimethoxy-6-methylphenyl)methanone in or on the following commodities:

Commodity	Parts per million
Grape	4.5
Grape, raisin	17

* * * * *

[FR Doc. 2010–30363 Filed 12–2–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[CC Docket No. 02–6, GN Docket No. 09–51; FCC 10–175]

Schools and Libraries Universal Service Support Mechanism and A National Broadband Plan for Our Future

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) takes another step toward realizing the National Broadband Plan's vision of improving connectivity to schools and libraries by upgrading and modernizing the successful E-rate program. In particular, the Commission takes action on upgrades that can be implemented in funding year 2011 (July 1, 2011–June 30, 2012); enables schools and libraries to better serve students, teachers, librarians, and their communities by providing more flexibility to select and make available the most cost-effective broadband and other communications services; simplifies and streamlines the program; and improves safeguards against waste, fraud and abuse. In addition, the Commission adopts the eligible services list for funding year 2011.

DATES: Effective January 3, 2011.

FOR FURTHER INFORMATION CONTACT: Regina Brown, Wireline Competition

Bureau, Telecommunications Access Policy Division, (202) 418–0792 or TTY: (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Sixth Report and Order in CC Docket No. 02–6, GN Docket No. 09–51, FCC 10–175, adopted September 23, 2010, and released September 28, 2010. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (800) 378–3160 or (202) 863–2893, facsimile (202) 863–2898, or via the Internet at *http://www.bcpiweb.com*. It is also available on the Commission's Web site at *http://www.fcc.gov*. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

I. Introduction

1. In this order, we take another step toward realizing the National Broadband Plan's (NBP) vision of improving connectivity to schools and libraries by upgrading and modernizing the successful E-rate program (more formally known as the schools and libraries universal service support mechanism). Schools and libraries can serve as anchor institutions for their communities, and certain areas may depend on these anchor institutions to achieve the NBP's goal of affordable access to broadband of at least 1 gigabit per second in every community in the country. Broadband is an essential tool to help educators, parents, and students meet challenges in education and life-long learning. Through broadband, librarians can assist library patrons to improve skills for jobs, apply for employment, or access government resources. Access to broadband—at home or at anchor institutions—is a critical component of enabling everyone in America to develop the digital skills they need to prosper in the 21st century.

2. The NBP, delivered to Congress on March 16, 2010, recommended that the Commission take a fresh look at the E-rate program and identify potential improvements to reflect changes in technology and evolving teaching methods used by schools. In May 2010, the Commission issued a Notice of Proposed Rulemaking (NPRM) seeking public comment on proposals to ensure that the E-rate program continues to help our children and communities prepare for the high-skilled jobs of the future and reap the full benefits of the Internet. The Commission received extensive comments in response to the *E-rate Broadband NPRM,* 75 FR 32699, June 9, 2010, which inform the policy choices made in this order.

3. We adopt a number of the proposals put forward in the *E-rate Broadband NPRM.* The revisions we adopt today fall into three conceptual categories: (1) Enabling schools and libraries to better serve students, teachers, librarians, and their communities by providing more flexibility to select and make available the most cost-effective broadband and other communications services; (2) simplifying and streamlining the E-rate application process; and (3) improving safeguards against waste, fraud, and abuse. As a result of these changes, schools and libraries throughout the country can make their limited dollars go further. The changes we adopt will increase the ability of students and the public to utilize broadband services for educational needs. In addition, the changes to simplify the E-rate program will help reduce the cost of participating in the program, thereby making the program more accessible, particularly to smaller school districts and libraries that are often located in more rural areas and may not have staff dedicated to managing E-rate applications and related activities.

4. In particular, in this report and order, we:

○ Enable schools and libraries to better serve students, teachers, librarians, and their communities by providing more flexibility to select and make available the most cost-effective broadband and other communications services by

- Allowing applicants to lease dark or lit fiber from the most cost-effective provider, including non-profit and for-profit entities, so that applicants can choose the services that best meet their needs from a broad set of competitive options and in the most cost-effective manner available in the marketplace;
- Changing our rules to permit schools to allow community use of E-rate funded services outside of school hours;
- Supporting eligible services to the residential portion of schools that serve students with special circumstances;
- Indexing E-rate's funding cap to inflation to preserve the purchasing power of a successful program;

■ Seeking proposals for a limited pilot program to establish best practices to support off-campus wireless connectivity for portable learning devices outside of regular school or library operating hours;

○ Simplify and streamline the program by

■ Streamlining the application process to reduce the administrative burden on applicants;

■ Removing the technology plan requirement for priority one (telecommunications services and Internet access) services;

■ Facilitating the disposal and recycling of obsolete equipment that received E-rate support by authorizing schools and libraries to receive consideration for such equipment; and

○ Improve safeguards against waste, fraud and abuse by

■ Codifying the requirement that competitive bidding processes be fair and open. In addition, the report and order adopts the eligible services list (ESL) for funding year 2011.

II. Upgrading E-Rate for the 21st Century

A. Improving Broadband Access for Students, Teachers, Librarians, and the Communities They Serve

1. Expanded Access to Low-Cost Fiber

5. Pursuant to sections 254(c)(3), (h)(1)(B), and (h)(2) of the Act, we include dark fiber on the ESL and allow eligible schools and libraries to receive support for the lease of fiber, whether lit or dark, as a priority one service, from *any* entity, including but not limited to telecommunications carriers and non-telecommunications carriers, such as research and education networks; regional, state, and local government entities or networks; non-profits and for-profit providers; and utility companies. Accordingly, we amend § 54.502 of our rules to allow any entity to provide supported telecommunications in whole or in part via fiber. Specifically, we require applicants that choose to lease dark (*i.e.,* unlit) fiber to light it immediately and to use the lit fiber to meet their broadband needs in order to receive E-rate support. Our decision today will not allow applicants to use E-rate discounts to acquire unneeded capacity or warehouse dark fiber for future use. Because dark fiber has not been classified as either a telecommunications service or Internet access, we hereby include it in the telecommunications section of the ESL. For purposes of funding year 2011, we

direct applicants to select either the telecommunications service or Internet access box on the FCC Form 471 for type of service requested when applying for funding for leased dark or lit fiber, based on the type of provider they select to provide the leased dark fiber service. We emphasize that selecting a telecommunications carrier as a service provider does not absolve schools and libraries of their obligation to adhere to the Children's Internet Protection Act (CIPA) requirements when they use that service to obtain Internet service or access to the Internet. Furthermore, we amend § 54.518 of our rules to clarify that states acting as service providers are treated the same as telecommunications carriers or other non-telecommunications providers when applicants are leasing a wide area network (WAN).

6. Section 254 of the Act gives the Commission authority to designate "telecommunications services" and additional services as eligible for support under the E-rate program. In the *Universal Service First Report and Order,* 62 FR 32862, June 17, 1997, the Commission designated all commercially available telecommunications services as services eligible for support (or discounts) under the E-rate program. At the same time, the Commission determined that it could provide E-rate support for additional, non-telecommunications services, particularly Internet access, email, and internal connections, provided by both telecommunications carriers and non-telecommunications carriers pursuant to sections 4(i) and 254(c)(1), (c)(3), (h)(1)(B), and (h)(2). The Commission reasoned that such services enhance access to advanced telecommunications and information services for public and non-profit elementary and secondary school classrooms and libraries. Thus, pursuant to this authority, we now include on the ESL leased dark and lit fiber provided by both telecommunications carriers and non-telecommunications carrier providers, as described below.

7. Although lit fiber is already eligible for funding as either a telecommunications service or an Internet access service (depending upon how it is used by an eligible school or library and who is providing the service), under current implementation of section 254, an applicant cannot lease the lit fiber for voice telecommunications from a non-telecommunications carrier. State networks and other providers, however, may be able to provide the voice telecommunications, even if they are not "offering it to the public for a fee," as is required of a telecommunications carrier. Section 254(h)(1)(B) requires telecommunications carriers to provide universal service to schools and libraries; it does not, however, stand as a bar to our authority to allow non-telecommunications providers to provide such services and participate in the E-rate program. As explained below, drawing a distinction between telecommunications carriers and entities other than telecommunications carriers in this specific context would unduly limit the flexibility of schools and libraries to select the most cost-effective broadband solutions to meet their needs, which would be inconsistent with our schools and libraries policies. We find that broadening the scope of potential suppliers of broadband increases competitive options, which in turn enhances choice and reduces cost. Thus, pursuant to section 254(c)(3) and (h)(2) and section 4(i), we now include lit fiber provided by non-telecommunications providers on the ESL. We conclude that eligible schools and libraries should be free to meet their communications needs by leasing fiber from entities other than telecommunications carriers that are able to provide schools and libraries the same services that a traditional telecommunications carrier can provide a school or library over a fiber network.

8. The Commission precedent refutes any contention that leasing dark fiber is not a "service." Because dark fiber is a service, we do not have to decide whether we could otherwise fund it under section 254(h). Moreover, like internal connections, which the Commission has found to be services for purposes of the E-rate program, dark fiber is part of the transmission path that enables the requisite functionality (delivery of voice, video and/or data) to be delivered to the classroom. Further, contrary to opponents' arguments, we find that dark fiber does enhance access to advanced telecommunications and information services consistent with section 254(h)(2)(A). As discussed below, allowing schools and libraries to lease fiber from any provider will give the institutions more flexibility to select the most cost-effective broadband solutions. It should also increase competition among providers of fiber and ensures that schools and libraries can pay less for the same or greater bandwidth, which should increase access to advanced telecommunications and information services, including Internet access. Additionally, if schools and libraries are able to receive additional capacity for less money, this should free up E-rate funding to help other schools and libraries meet their connectivity goals.

9. As instructional technology requires greater bandwidth, applicants will benefit from having the freedom to select from more options for broadband access. If more providers bid to provide services to schools and libraries, the resulting competition should better ensure that applicants—and the E-rate program—receive the best price for the most bandwidth. If schools and libraries are able to receive the same—or better—capacity for less money, the program should save money that can be spent on other services to help schools and libraries meet their connectivity goals. We thus find that allowing schools and libraries to lease fiber from any provider will best serve the purposes of the E-rate program.

10. The designation of dark and lit fiber provided by telecommunications carriers and non-telecommunications carrier providers as services eligible for E-rate support should help schools and libraries save money or receive additional capacity for the same or fewer dollars. Commenters provided many examples of schools and libraries that are using fiber today because it is the most cost-effective solution for them, even without E-rate support. For example, the Tri-County Educational Service Center in Wooster, Ohio, which serves more than 30,000 students in 19 school districts across three Central Ohio counties, has been able to save 50 percent over traditional carrier services through the use of dark fiber, along with a 750 percent increase in network performance. Such cost savings will help E-rate funds go further.

11. Furthermore, the increased capacity available through fiber will enable schools and libraries to develop and deliver a wide variety of educational programs and services to students and library patrons. For example, the bandwidth used by San Francisco's public libraries has increased over the past five years, from 1.44 megabits per second (Mbps) to 50 Mbps, but even 50 Mbps is currently insufficient for San Francisco to deliver the bandwidth-intensive content available on the Internet through its libraries' online resources and databases. San Francisco's public library branches serve as community anchors, both as centers for digital literacy and as hubs for access to public computers. While their bandwidth needs are increasing, their local government and school district budgets are shrinking. Currently, San Francisco's public libraries must rely on commercial telecommunications services in order to

take advantage of E-rate discounts. As bandwidth needs continue to increase, the ability to receive E-rate discounts on leased fiber will provide another option for schools and libraries, such as those in San Francisco, to access the bandwidth they need to deliver the most cost-effective services to their students and patrons, thus enhancing access to advanced telecommunications and information services. Our action today encourages collaboration with local, state, and federal agencies to more effectively utilize existing facilities and resources to meet the broadband needs of schools and libraries across the nation.

12. We are not persuaded by commercial service providers' arguments that entities other than commercial service providers cannot be trusted to serve applicants adequately, or that schools and libraries are unequipped to lease dark fiber. There are a variety of entities—from telecommunications carriers to non-traditional providers, including research and education networks; regional, state, and local government entities and networks; other non-profit and for-profit providers; and utility companies—that are successfully provisioning fiber solutions. For example, the City of San Francisco has provisioned dark fiber to 10 campus sites of City College of San Francisco, one of the largest college systems in the country. The City College network has enabled the implementation of new classes, allowed expansion of computer labs, and facilitated deployment of new educational applications that would not have been possible with City College's previous networking environment. Additionally, in the last 13 years, non-profit national and state research and education networks have deployed almost 25,000 miles of a national fiber infrastructure to more than 66,000 community anchor institutions.

13. Some commercial service providers argue that school and library information technology (IT) professionals are unlikely to understand how to use leased dark fiber. We find no evidence in the record supporting that assertion, and note that many schools and libraries have expert, professional IT staff. We believe applicants are generally in the best position to know their needs, resources, and capabilities, and to procure from the full range of competitive options in the marketplace the most cost-effective broadband solutions for those needs. Nor are we persuaded by suggestions that we should not provide flexibility to allow schools to lease dark fiber or other spare capacity from a municipal network because the schools would be unprotected if the municipality cannot continue to operate. It is unclear why a municipality would be more likely to discontinue service than a private company, and, in any event, our rules permit schools and libraries to change service providers under certain circumstances when the service provider ceases operations or is unable to perform. Further, we are not convinced that schools and libraries purchasing services from other governmental or non-profit entities will raise conflict of interest issues or financial conflicts related to their employees. We believe our competitive bidding rules protect against any such waste, fraud, and abuse of the E-rate program. To the extent the Commission finds violations of its rules, such as sharing of inside information during the competitive bidding process, the Commission will require USAC to adjust its funding commitment or recover any disbursed E-rate funds through its normal processes.

14. Commenters that opposed including leased dark fiber on the ESL also argue that schools and libraries will be unaware of or unable to bear the additional cost of installation. They also argue that leased fiber may include more capacity than needed by a school or library system for educational purposes. We are not persuaded by such arguments. The Commission's competitive bidding rules serve as a central tenet of the E-rate program. They ensure more efficient pricing for telecommunications and information services purchased by schools and libraries and help deter waste, fraud and abuse. Thus, while not all schools and libraries may choose to use leased fiber to meet their broadband needs, our rules require all applicants to select the service or equipment offering that will be the most cost-effective means of meeting their educational needs and technology goals. Our rules also require schools and libraries to have the necessary resources to support any non-discounted portion of the eligible services, in order to make the most effective use of E-rate funding. We believe these two rules will ensure that all applicants that choose to use a leased fiber solution are considering the full range of costs associated with implementing leased fiber and are not requesting funding for more capacity than necessary for their educational needs. We also emphasize, in this context, the importance of applicants making "apples-to-apples comparisons when evaluating competing bids to meet their needs. Providing services using dark fiber may involve a number of additional costs beyond lease payments for fiber connectivity, and those costs should be factored in to a total-cost comparison across bids.

15. In order for schools and libraries to utilize and make the most efficient use of dark fiber, we include as eligible certain costs associated with leased dark fiber. Specifically, we include as eligible maintenance costs and installation charges. Providing support for maintenance costs and installation charges will enhance access to advanced telecommunications and information services by helping schools and libraries make use of an existing or new local fiber network. At this time, however, we decline to extend support to cover special construction charges that may be incurred to build out connections from applicants' facilities to an off-premises fiber network, preferring to seek further comment in a subsequent proceeding on the potential effect of such changes on the fund. We also do not include as eligible the cost of modulating electronics needed to light dark fiber. The applicant is therefore responsible for covering these costs in order to receive E-rate funding for the lease of dark fiber. While we conclude that including leased dark fiber on the ESL should provide greater flexibility to E-rate participants to meet their bandwidth needs and reduce their overall cost of broadband, we nevertheless limit funding in this manner pending further inquiry into the potential impact on the E-rate fund of allowing related costs.

2. Community Use of Schools' E-Rate Funded Facilities and Services

16. We conclude that we should revise our rules to permanently allow schools to open their facilities, when classes are not in session, to the general public to utilize services and facilities supported by E-rate. Specifically, we revise §§ 54.503 and 54.504 of our rules to require applicants to certify that "[t]he services the applicant purchases at discounts will be used *primarily* for educational purposes." This is consistent with the standard we adopted in the *Community Use Order,* 75 FR 10199, March 24, 2010. Thus, schools must primarily use services funded under the E-rate program, in the first instance, for educational purposes. To primarily use services supported by E-rate, E-rate recipients must ensure that students always get first priority in use of the schools' resources.

17. Our experience convinces us that our decision will expand the benefits of using E-rate funds. For example, after we waived the rule in February 2010,

the State of West Virginia allowed community use of school Internet access and networks by offering evening community technology training lab classes and school technology nights. Most notably, during the April 2010 Upper Big Branch coal mining disaster, a school in West Virginia whose students were on spring break provided community access to its facilities to be used as a government and media command center during the rescue and eventual search and recovery efforts. We thus find that permitting community use of E-rate services and equipment during times when classes are not in session (non-operating hours) will promote broadband access. Moreover, this decision is consistent with Congress's directive to consider how anchor institutions, such as schools, can ensure access to broadband service. We remain focused on Congress's primary purpose in establishing the schools component of the E-rate program: to ensure that educators, students, and school personnel have access to advanced telecommunications and information services for educational purposes. At the same time, there are many times when schools are out of session—evenings, weekends, school holidays, and summer breaks, for example—and we conclude that it is in the public interest to allow greater use of government-supported services and facilities during those times, particularly because that enhanced access comes at no additional cost to the E-rate program. Moreover, we find that the revised rules are consistent with the overarching goals of universal service to promote access to telecommunications and information services, and that no provision of the Communications Act prohibits this use of E-rate supported services.

18. To reduce the likelihood of waste, fraud, and abuse, and to guard against expanding the cost of the E-rate program, we set forth certain conditions for schools that choose to allow the community to use their E-rate funded services. First, schools participating in the E-rate program may not request funding for more services than are necessary for educational purposes to serve their current student population. This condition is necessary to ensure that E-rate funds that schools receive remain targeted to the educational needs of the institution and its students. This is essential to preserve limited funds and to carry out Congress's intent in establishing the E-rate program. To the extent that a school desires to augment services beyond that which is necessary for educational purposes, it must use other, non-E-rate funded resources. Any community use of the services purchased under the E-rate program must be incidental and not increase overall costs to the E-rate program.

19. Second, any community use of E-rate funded services at a school facility shall be limited to non-operating hours of the school and to community members who access the Internet while on a school's campus. Thus, the public can utilize a school's facilities and services during times when the school is not in session, such as after school hours, weekends, school holidays, and summer breaks. Services supported by E-rate funds must, in the first instance, be used for educational purposes, and students, educators, and other school personnel shall always get priority in the use of these resources. Further, the decision about whether to allow community access rests with the school, and we thus leave it to schools to establish their own policies regarding specific use of their services and facilities, including, for example, the hours of use. We decline at this time to provide guidance on after-hours community use policies. We find that schools are in the best position to establish their own individualized policies, including ways in which to inform the public of the hours of operation to the general public. While we are sensitive to placing additional administrative burdens on applicants, we plan to include a box on the FCC Form 471 when we next revise this form for applicants to check if they are taking advantage of this rule change. We believe checking a box indicating community use, without requiring additional, specific information, will enable the Commission to develop a better understanding of where such community use is occurring while at the same time minimizing applicants' reporting burden. In addition, we urge schools to make their community use policies and hours publicly available on their Web sites. Additionally, schools can submit their success stories directly to the Commission regarding the community's use of their E-rate funded facilities and services at the Commission's Web site, *http://www.fcc.gov/wcb/tapd/universal_service/schoolsandlibs.html,* in the section titled "E-rate Community Use Success Stories."

20. Third, as set forth in the Act and our rules, schools' discounted service or network capacity may not be "sold, resold, or transferred by such user in consideration for money or any other thing of value." Specifically, schools may not charge for the use of services and facilities purchased using E-rate funds. The Commission concluded, however, in the *Universal Service First Report and Order,* that section 254(h)(3) of the Act does not prohibit an eligible entity from charging fees for any services that schools or libraries purchase that are not subject to a universal service discount. Thus, the Commission found that an eligible school or library may assess computer fees to help defray the cost of computers or training fees to help cover the cost of training because these purchases are not subsidized by the universal service support mechanisms. Similarly, we agree with the Massachusetts Department of Telecommunications and Cable (MDTC) and Sprint that schools should not be prohibited from recovering costs reasonably associated with permitting community access, such as additional electricity, security, and heating costs used to facilitate community access.

21. We emphasize that the revision of our rules creates an opportunity for schools, but not an obligation. Schools may have any number of reasons to decide not to open their facilities to the general public to utilize services and facilities supported by E-rate during non-operating hours. For example, some schools may find that school activities utilize all or almost all of the E-rate supported services, or that there is not a public need for use during non-operating hours in a particular school. We therefore stress the optional nature of these rule revisions, leaving this decision up to individual recipients of E-rate funding.

3. Expanding Access for Residential Schools That Serve Unique Populations

22. We adopt our proposal to allow residential schools that serve unique populations—schools on Tribal lands; schools designed to serve students with medical needs; schools designed to serve students with physical, cognitive or behavioral disabilities; schools where 35 percent or more of their students are eligible for the national school lunch program; or juvenile justice facilities—to receive E-rate funding for all supported services provided in the residential areas of those schools. We find that, because these schools also serve as residences to the students, the supported E-rate services will be used primarily, if not exclusively, for educational purposes, and thus support is consistent with our rules and with the purposes of section 254. As the Commission stated in the *Schools and Libraries Second Report and Order,* 68 FR 36931, June 20, 2003, the technology needs of participants in the E-rate program are often complex and unique

to each participant. Based on the record before us, we find that these schools serve students whose educational needs may not be otherwise met without attending such a residential school. We therefore find it to be reasonable and consistent with the public interest to provide support for E-rate services provided to the residential areas of those schools, including Internet access, telecommunications, telecommunications services, and internal connections. Additionally, E-rate support will facilitate ongoing access to educational and learning materials beyond the normal school day and increase the ability of those students to complete homework assignments, such as those that require broadband access for research projects, after school hours. Accordingly, we find that such use meets the definition of educational purposes. Additionally, we amend § 54.502 to permit discounts for internal connections in non-instructional buildings of a school or school district where the Commission has found that the use of those services meets the definition of educational purpose.

23. We decline, at this time, to adopt SECA's suggestion to expand this proposal to *any* school that has a dormitory or residential facility on its grounds. While we recognize that there are other residential schools that do not fall within the categories outlined above, we want to proceed in a conservative fashion to focus on schools serving students with the most unique needs as provided above, rather than providing funding more broadly to all residential schools. Thus, we believe it is preferable to limit the potential impact of this revision on the E-rate program as we consider additional upgrades to the program. We agree with SECA, however, that we should not limit support to residential campuses that are state- or federal-sponsored institutions. For instance, there may be private schools that serve students with physical, cognitive, or behavioral disabilities, and their students face the same need to have ongoing access to technology-based learning outside of the classroom. Therefore, we decline to limit support for services to residential areas only to schools partly or fully sponsored by state or federal funds.

24. *West Virginia Request for Waiver and Clarification.* The West Virginia Department of Education (WVDE) filed a request for waiver and clarification of the Commission's rules to allow the West Virginia Schools for the Deaf and the Blind to receive funding for services for their students who reside on the school campus. Because we address the issues raised by WVDE in this order, we dismiss WVDE's request as moot.

4. Indexing the Annual Funding Cap to Inflation

25. Many commenters encouraged the Commission to increase the E-rate program funding cap significantly from its current $2.25 billion level before indexing the cap to inflation on a going-forward basis. Commenters contend that the Commission should increase the cap to reflect all inflationary adjustments since the program was initiated in 1997, which would immediately add about $650 million to the E-rate program. Others said that indexing the E-rate cap to inflation on a going-forward basis would not be sufficient to meaningfully fund the program. We note that when the E-rate program began in 1997, basic Internet connectivity required a phone line and dial-up Internet service, which might have cost a total of less than $50 per month. Today, for basic Internet connectivity capable of supporting common applications and learning tools such as educational video content, a school or library needs broadband at speeds of at least several megabits per second, which might cost upwards of $500 per month (*e.g.,* for a T–1 line), plus the costs of necessary internal connections.

26. We find that indexing the current $2.25 billion E-rate cap to inflation is a sensible approach to gradually aligning the support provided by E-rate with the needs of schools and libraries, which the E-rate program is designed to serve. Using the analysis described below, the cap for funding year 2010 will be increased to $2,270,250,000. The Commission must balance its desire to ensure that schools and libraries have access to valuable communications opportunities with the need to ensure that consumer rates for communications services remain affordable. End users ultimately bear the cost of supporting universal service, through carrier charges. Thus, we amend § 54.507 of our rules to index the E-rate program funding cap to the rate of inflation on a going-forward basis, beginning in the current funding year. Indexing the cap to inflation will ensure that the program maintains its current purchasing power in today's dollars without significantly increasing the fund and raising the contribution factor.

27. It could be argued that the existence of substantial rollover funds demonstrates that an increase in the cap is unwarranted. The rollover funding is not surplus funding left over after demand has been met, however. To the contrary, even with an additional $600 million in rollover funding for funding year 2008, added to the $2.25 billion cap, the program still did not come close to meeting demand for priority two services and was forced to deny millions of dollars in applications because existing funding had been exhausted. The Commission uses the full extent of funds available, including rollover funds, to meet demand each year. Nevertheless, demand still exceeds available funding.

28. We also note that additional universal service funds required to index the E-rate cap to inflation will be offset by the Commission's recent decision to use reclaimed funds surrendered from competitive eligible telecommunications carriers as a "fiscally responsible down payment on proposed broadband universal service reforms," including indexing the E-rate funding cap to inflation. Thus, reclaimed universal service funds will be used to cover any increase that results from increases to the fund from inflation adjustments. Finally, no party objected to an increase in the cap and many supported the proposal. They noted that this step will ensure that the program continues to serve a key role in bringing essential communications and information services to thousands of schools and libraries. One commenter noted that an increase in the E-rate funding cap should occur only after the completion of comprehensive reform of the contribution methodology. We find, however, that the adoption of a fiscally responsible increase in the funding cap will not interfere with our broader efforts to reform the contribution methodology and acts only to give some relief to a capped support mechanism that is consistently oversubscribed.

29. As proposed, the Commission will use the gross domestic product chain-type price index (GDP–CPI) to inflation-adjust the amount of funds available annually to E-rate program participants. This is the same index the Commission uses to inflation-adjust revenue thresholds used for classifying carrier categories for various accounting and reporting purposes and to calculate adjustments to the annual funding cap for the high-cost loop support mechanism. There is no index that specifically examines the cost of the services funded under the E-rate program, and no record support for a more targeted measure of inflation than the GDP–CPI. Moreover, the Commission has used the GDP–CPI index in other contexts to estimate inflation of carrier costs, and we find it reasonable to use the GDP–CPI to approximate the impact of inflation on E-rate supported services. During periods of deflation, we will maintain

the prior-year cap to maintain predictability. When the calculation of the yearly average GDP–CPI is determined, the Wireline Competition Bureau Commission will publish a Public Notice in the **Federal Register** within 60 days announcing any increase of the annual funding cap based on the rate of inflation.

30. Specifically, to compute the annual increase, the percentage increase in the GDP–CPI from the previous year will be used. The increase shall be rounded to the nearest 0.1 percent. The increase in the inflation index will then be used to calculate the amount of funding for the next E-rate funding year (which runs from July 1 to June 30). Using this computation, we find that the GDP–CPI from 2008 to 2009 increased .9 percent. Using the analysis described below, the cap for funding year 2010 will be increased to $2,270,250,000.

5. Limited Trial To Investigate Offsite Access

31. Currently, our rules presume that services used on school or library premises are serving an educational purpose, and the E-rate program supports wireless Internet access on school and library grounds. If a device that provides wireless Internet access service, such as a laptop or other mobile computing device, is taken off school or library premises, however, applicants are required to cost-allocate the dollar amount of support for wireless Internet access use for the time that the device is not at the school or library and remove that portion from its E-rate funding request. If that same device, however, is left on school or library grounds all of the time, the E-rate program would pay 100 percent of the applicant's non-discount share for wireless Internet access use. As such, our current rules may prevent full utilization of the learning opportunities that portable wireless devices, such as digital textbooks, can provide off campus and outside of regular school hours.

32. Advances in technology have enabled students to continue to learn well after the school bell rings, including from their homes or other locations, for example, youth centers. As noted in the NBP, "[o]nline educational systems are rapidly taking learning outside the classroom, creating a potential situation where students with access to broadband at home will have an even greater advantage over those students who can only access these resources at their public schools and libraries." In the *E-rate Broadband NPRM,* we sought comment on the NBP recommendation to provide full E-rate support for wireless Internet access service for portable learning devices that are used beyond school or library premises. In response, commenters generally agreed that students need to learn "anytime/anywhere," which would require Internet access outside schools and libraries. Some schools identified that they are already implementing innovative programs utilizing portable devices that can use data applications wirelessly, such as e-readers, tablet PCs, smartphones, and netbooks. Some of these programs enable students to download all of their textbooks onto one portable device and access them both during school and at home. Others use software applications to help students write essays or create presentations for their classmates. Initial studies indicate that—with the correct support and training for teachers, students, and parents—targeted programs like these can demonstrably improve student achievement. Commenters noted that, in addition to the educational benefits, improvements and cost reductions in portable learning devices like e-readers, smartphones, and tablet computers make funding off-premises wireless connectivity for these devices a cost-efficient supported service.

33. We recognize the benefits of enabling innovation in learning outside the boundaries of the school building and the traditional school day, as well as of enabling libraries to innovate with new models of delivering service to library patrons. We note the potential for meaningful gains in student achievement that new devices and applications may deliver. We also see significant utility in devices that allow remote access to the Internet for library patrons. At the same time, however, we acknowledge the concerns of commenters who urged us to proceed cautiously in this area and emphasized the challenges that may accompany support for connectivity for portable learning devices used outside the physical grounds of schools and libraries. For example, some commenters identified possible challenges in administration and oversight, and in ensuring compliance with existing program rules, including requirements under CIPA and the program's definition of educational purposes. Others raised concerns about the potential for waste, fraud, and abuse, as well as increased costs to the E-rate fund, noting that if support is expanded for wireless Internet access outside of school or library grounds, the availability of funding for other equally or more important services may be reduced. Some commenters also were concerned about schools or students who may not be able to afford the equipment or devices necessary to connect to E-rate funded wireless Internet services. Finally, some commenters argued that E-rate funding for wireless access off premises is not technology-neutral and improperly favors wireless services over wired services. We believe these concerns warrant further inquiry and consideration before such services should be eligible for support on a program-wide basis.

34. *The E-rate Deployed Ubiquitously (EDU) 2011 Pilot Program.* To assist us in our inquiry and program development, we establish a trial program to investigate the merits and challenges of wireless off-premises connectivity services, and to help us determine whether they should ultimately be eligible for E-rate support. We plan to use this trial program to gather more information about the implementation challenges described above and to identify and disseminate best practices in existing projects. We ask schools and libraries that already are implementing or experimenting with wireless off-campus learning to provide us with information about their projects, as described below.

35. A number of commenters have indicated that they have already found solutions to the challenges to successfully implementing off-premises wireless Internet connectivity, including ensuring CIPA compliance and other protections against waste, fraud and abuse. Additionally, some commenters suggested that corporate partnerships may help with equipment and application costs. Through the EDU2011 Program, we expect to obtain more information about how wireless learning programs are operating today. For example, we hope to gain a better understanding of operational and administrative issues associated with off-premises use and connectivity, as well as the financial impact on the E-rate program overall. We also hope to learn what conditions, if any, should accompany off-premises access to prevent waste, fraud, and abuse; to ensure compliance with the statute and Commission rules, such as CIPA; and to enable such programs to maximize student achievement and utilization of library services. Additionally, we recognize that schools and libraries face different issues when considering off-premises use, and we would like to gain a greater understanding about how libraries are using remote access to serve their communities. Finally, we hope to gain insight on evolving uses of mobile

wireless devices that will assist us in crafting effective permanent rules in this area should we decide to support offsite wireless access.

36. As part of this first phase, we may decide to fund off-campus wireless telecommunications and Internet access for some small number of select programs for funding year 2011, if we find proposals that we believe adequately meet the factors we discuss below. We expect that most of these proposals will not provide broad access to the Internet, but instead will provide connectivity for limited purposes, for example downloading digital textbooks. We authorize up to $10 million for funding year 2011 to support innovative and interactive off-premise wireless device connectivity for schools and libraries. Given the Commission's planning and competitive bidding requirements, we recognize there is limited time for applicants to develop a proposal from scratch for this round of funding. Therefore, considering those practical barriers, we anticipate that any first phase EDU2011 Program funding will primarily, if not exclusively, be provided to already-existing portable wireless device programs.

37. *How To Apply.* We delegate implementation of this pilot program to the Wireline Competition Bureau (Bureau). To be considered for first phase EDU2011 Program funding, applicants must complete a two-step application process. After publication of this Order in the **Federal Register**, the Bureau will release a public notice with the due date for applications. First, applicants must submit the information detailed in the following paragraph to the Bureau. Second, applicants must apply for E-rate funding by following the regular E-rate program rules. Because potential applicants will most likely already be using portable wireless devices in their school or library, we understand that the applicants may have an established relationship with a service provider. Therefore, to the extent necessary, we waive the applicable sections of our E-rate competitive bidding rules for those first phase EDU2011 Program applicants that have already entered into legally binding agreements with a service provider for portable wireless device connectivity off-premises. We also delegate to the Bureau the authority to waive any other E-rate rules, to the extent necessary, to effectuate this program. Applicants for first phase EDU2011 Program funding must submit FCC Form 471 to USAC during the regular application window. We encourage applicants to submit FCC Form 471 specifically for the wireless Internet access services to be used off premises, and file a separate FCC Form 471 for any services to be used on premises. We note that support under this program will not be provided for the portable devices or equipment, but for the connectivity services.

38. To be considered for first phase EDU2011 Program funding, E-rate eligible applicants must have implemented or already be in the process of implementing a program to provide off-premise connectivity to students or library patrons through the use of portable wireless devices. The application must contain the following information:

(1) A description of the current or planned program, how long it has been in operation, and a description of any improvements or other changes that would be made if E-rate funding were received for funding year 2011;

(2) Identification of the costs associated with implementing the program including, for example, costs for equipment such as e-readers or laptops, access and connection charges, teacher training, librarian training, or student/parent training;

(3) Relevant technology plans;

(4) A description of how the program complies with CIPA and adequately protects against waste, fraud, and abuse;

(5) A copy of internal policies and enforcement procedures governing acceptable use of the wireless device off the school's or library's premises;

(6) For schools, a description of the program's curriculum objectives, the grade levels included, and the number of students and teachers involved in the program; and

(7) For schools, any data collected on program outcomes.

39. *Selection.* After applications are received, for schools, the Bureau should consider the extent to which applicants are providing innovative and interactive learning programs using portable wireless devices for students. For libraries, the Bureau should consider how the library's portable wireless device program facilitates access in the community to needed services, such as job applications, governmental services, job training, and online learning opportunities. Factors the Bureau should consider in selecting programs that may be eligible for additional funding include: The magnitude of the impact E-rate support for off-premise connectivity is likely to have; the number of students or library patrons served; the cost of the program; the poverty level and current discount rate of the school or library; the financial need of the school or library; the location and topography of the school or library, so that we can analyze the availability of wireless access; the committed school or library resources available to implement the entire proposal, including funding for necessary equipment, as well as teacher, librarian, and student training and data collection; and the extent of CIPA protections and other protections to guard against waste, fraud, and abuse.

40. The Bureau will notify USAC of selected applicants. We expect that, if the Bureau decides to award funding for these programs, there will be only a handful of selected applicants. Selected applicants will receive the identified connectivity support and will not be required to cost-allocate the dollar amount of support for the time that portable devices are not at the school or library. Applicants will receive funds sufficient to cover the connectivity amount eligible for E-rate funding based on their discount; they will still be required to pay their non-discount share. After the trial period, applicants will be required to submit a report to the Bureau detailing any data collected as a result of the program and a narrative describing lessons learned from the program that would assist other schools and libraries desiring to adopt similar programs in the future.

B. Streamlining and Simplifying Administrative Requirements

41. We next adopt proposals to streamline and simplify the E-rate programs. First, we amend § 54.508 of our rules to eliminate the E-rate technology plan requirements for all priority one applications. We retain the technology plan requirements for applicants requesting priority two funding. Second, we find that applicants are not required to have a technology plan in place before a third-party master contract's FCC Form 470 is posted. Third, we also amend § 54.508 to eliminate the requirement that applicants demonstrate they have a budget sufficient to acquire and support the non-discounted elements of the plan. Fourth, we permit the disposal of E-rate equipment for payment or other consideration, but no sooner than five years after the equipment is installed.

1. Technology Plans

42. We amend §§ 54.504 and 54.508 of our rules to eliminate the E-rate technology plan requirements for all priority one applications. We retain, however, the technology plan requirements for applicants requesting priority two funding.

43. To avoid duplication of technology plan requirements and to simplify the application process in

general, we proposed in the NPRM to eliminate E-rate technology plan requirements for applicants seeking priority one services that are otherwise subject to state and local technology planning requirements. Commenters indicated, however, that determining which applicants seeking priority one services are subject to technology plan requirements outside of the E-rate program could be difficult, might lead to unnecessary violations of program rules, and could be administratively difficult to administer. Because the record demonstrates that applicants are required to or will likely perform technology planning even without the E-rate program requirements, we find that eliminating the technology planning requirement entirely for priority one funding will better serve the intent of the NPRM proposal to simplify the application process, while still adequately addressing concerns regarding waste, fraud, and abuse.

44. *Priority One.* The Commission must strive to balance the need to ensure that E-rate funds are being used for their intended purposes with avoiding the imposition of unnecessarily burdensome requirements on applicants. Moreover, the Commission must routinely reevaluate its program rules to ensure that it has struck the proper balance. After careful consideration of our experience and comments in the record, we conclude that the proper balance warrants eliminating the Commission's technology plan requirements for applicants requesting priority one services.

45. We find that it is reasonable to eliminate the technology plan requirement for all priority one service requests, even when the applicant is not subject to a state or local technology planning requirement, and regardless of the amount of the request. Even without a Commission requirement, most entities will continue to evaluate their needs by conducting technology planning. Applicants applying for Enhancing Education Through Technology (EETT) funding from the Department of Education must comply with a technology plan requirement nearly identical to the Commission's. The Elementary and Secondary Education Act, reauthorized in 2002 as the No Child Left Behind Act, also has requirements that overlap with E-Rate's technology planning rules. In addition, technology planning is often incorporated into the budget and procurement processes of schools and libraries. Thus, we find that applicants generally will continue to perform technology analyses notwithstanding elimination of the technology plan requirement for E-rate.

46. Furthermore, we find that this change will simplify the current application process and will reduce the costs for applicants of complying with and administering the E-rate program. Reducing the burden on applicants will result in greater E-rate participation, particularly for the schools with the fewest resources and greatest need to participate in the program. Eliminating the technology plan requirement for priority one applications also will reduce costs associated with administering the E-rate program.

47. Moreover, the Commission has other safeguards to ensure that priority one funding requests are based "on the reasonable needs and resources of the applicant and are consistent with the goals of the program." For instance, to ensure that applicants are able to use the discounted services effectively, and thereby minimize waste, our rules require applicants to certify that they 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." The Commission has additional protections in place to guard against waste, fraud, and abuse in the E-rate program. Although we find that we no longer need the technology play requirement for priority one services in light of the other protections in place, we will remain vigilant to ensure that eliminating this requirement does not increase opportunities for waste, fraud, and abuse.

48. *Priority Two.* We conclude that we should retain the requirement to have a technology plan for priority two services. We find that maintaining a specific technology plan requirement for E-rate applicants for priority two services—internal connections and basic maintenance of internal connections—continues to serve a valuable purpose and therefore outweighs any potential administrative burden. Many commenters support this conclusion. First, our experience reflects that waste, fraud, and abuse tends to be concentrated in use of priority two services. Past experience convinces us that we should not at this time eliminate the technology plan requirement for priority two services. Second, installing internal connections in schools and libraries is a complex and expensive process, with installation techniques that vary depending on the nature of the project. Unlike priority one services, which are generally recurring services, internal connections are one-time upgrades that are designed to produce long-term benefits to schools and libraries. Maintaining the requirement for priority two services will require applicants to plan and justify these requests and strategically define their vision for use of these technologies.

49. For the reasons stated above, we decline to adopt proposals suggested by commenters either (1) to completely eliminate the technology plan requirement for priority two applicants; or (2) to establish a bifurcated approach in which only priority two applicants not subject to other state or local requirements are required to develop technology plans. It would be administratively burdensome for USAC to determine which schools and libraries are subject to official state and local technology plan requirements and which are not.

50. While we decline to eliminate the technology plan for priority two applicants, we adopt measures to simplify the technology planning process. First, we amend § 54.504 of our rules to eliminate the requirement that technology plans covering the entire, upcoming funding year be in place when the FCC Form 470 is submitted. Under the current rule, an applicant may not rely on an approved, existing technology plan if it expires prior to the last date of service of the upcoming funding year. We believe that the three-year technology plan cycle that has evolved for the E-rate program does not accurately reflect how schools and libraries plan for their technology needs. For example, if a school has developed and is implementing a three-year technology plan, it does not make sense to require the school to develop a new plan in October (before filing its Form 470) just because the existing plan expires before the upcoming funding year ends. The school should be able to obtain services under that existing technology plan if it covers part of the upcoming funding year and then revise the plan over the next several months before it expires. Forcing the applicant to prepare another three-year plan so far in advance of the end of the current one is administratively burdensome. Technology plans are evolving documents, and we want to encourage applicants to have technology plans that reflect their current needs. We thus find that applicants with approved technology plans that cover at least part of the upcoming funding year in effect as of the date of their FCC Form 470 filings will be deemed to be in compliance with our rules.

51. We also find that applicants are not required to have a technology plan in place before a third-party master

contract's FCC Form 470 is posted. FCC Forms 470 for master contracts typically are filed far in advance of the filing window because of the more detailed solicitation process they require. Schools and libraries typically have no control or advance knowledge of the solicitation of bids for third-party master contracts, and, as such, would have no way of knowing when their technology plans would need to be completed. Therefore, we find that, if an applicant has filed its own FCC Form 470, but later chooses to purchase a service from a state master contract, the applicant only needs to have a technology plan in existence prior to filing its own FCC Form 470. To do otherwise could unintentionally discourage applicants from taking service from a master contract.

52. We also amend § 54.508 of our rules to eliminate the requirement that applicants demonstrate they have a budget sufficient to acquire and support the non-discounted elements of the plan. The E-rate program already has rules in place to ensure that applicants have sufficient resources, and thus this requirement is redundant.

53. *E-Rate Central Petition.* E-rate Central filed a petition seeking clarification of the language defining "basic telephone services" for priority one services in the funding year 2008 ESL. The actions in this order address E-Rate Central's concerns. Therefore, we find that no further Commission action on E-Rate Central's petition is necessary.

2. Competitive Bidding Process

54. *FCC Form 470.* We retain the competitive bidding and waiting period obligations for all service requests, even where applicants are subject to state or local procurement obligations, rather than subjecting priority one and priority two applications to different standards, as proposed in the *NPRM.* We find, however, that we should simplify the FCC Form 470 process for all program participants. Many applicants requested that we simplify the FCC Form 470 if we do not eliminate it. After consideration of the record and our programmatic experience, we conclude that the competitive bidding and waiting period requirements have provided consistency and transparency for program participants in their search for the most cost-effective provider of E-rate eligible services. In seeking to achieve the proper balance between ensuring program integrity and eliminating excessive administrative burdens, we conclude that the preferable course is to simplify and redesign the FCC Form 470. We find that the changes we adopt will decrease the number of denials that stem purely from technical deficiencies rather than the applicant's failure to conduct a fair and open competitive bidding process. Streamlining the form to include only the information necessary to the competitive bidding process will also reduce appeals and increase program participation. Accordingly, we amend § 54.504(b) of the Commission's rules to reflect accurately the specific information being requested on the FCC Form 470 in order to facilitate a fair and open competitive bidding process.

55. We find that requiring the FCC Form 470 produces a better competitive bidding process. Currently, schools and libraries are required to post an FCC Form 470 to USAC's website so that service providers easily can view the services that are requested in one centralized location. While many schools and libraries must also follow their own state or local procurement processes, those bid requests are often limited to publication, for example, in local newspapers. The nationwide posting on USAC's website ensures that more service providers can obtain notice about the requests for bids. If more service providers are viewing and responding to proposals, the resulting additional competition should help keep prices lower for applicants and, in turn, require fewer dollars from the universal service fund. Many service providers noted that they annually review the posted FCC Forms 470 and submit bids to provide the requested services.

56. We anticipate that the new, simplified FCC Form 470 will take effect prior to the opening of the filing window for funding year 2011. However, if an applicant has already submitted an FCC Form 470 (in the current format) for funding year 2011, the applicant will not be required to submit a new form. Once the revised form has received Office of Management and Budget (OMB) approval, all applicants will be required to prepare and submit the newly revised form going forward. The Wireline Competition Bureau will announce the effective date of the new FCC Form 470 once approval has been received from OMB. If an applicant has not submitted an FCC Form 470 by the effective date, the applicant will need to submit the new FCC Form 470.

3. Clarifying Process for Disposal of Obsolete Equipment

57. *E-rate Program Rules and Requirements.* Section 254(h)(3) of the Act prohibits an eligible school or library that has purchased telecommunications services and network capacity at a discount under the E-rate program from reselling or otherwise transferring those services, or any equipment components of such service, in consideration for money or any other thing of value. In the *Schools and Libraries Third Report and Order,* 69 FR 6181, February 10, 2004, the Commission also prohibited schools and libraries from transferring the equipment components of eligible services to other schools within three years of their purchase, even without receiving money or other consideration, unless the donating school or library permanently or temporarily closes. The Commission also stated that "[r]ecipients of support are expected to use all equipment purchased with universal service discounts at the particular location, for the specified purpose for a reasonable amount of time." The Act and the Commission's rules, however, do not currently specify what schools and libraries are permitted do with equipment components of eligible services acquired with E-rate support once the equipment is obsolete.

58. *Process for Disposal of Obsolete Equipment.* We amend § 54.513(a) of our rules to permit the disposal of equipment components of E-rate services (E-rate equipment) for payment or other consideration, but no sooner than five years after the equipment is installed. We decline to adopt the reporting and recordkeeping requirements proposed in the *E-rate Broadband NPRM.*

59. First, we revise our rules to permit the disposal of E-rate equipment for payment or other consideration, but no sooner than five years after the equipment is installed. We find that section 254(h)(3) of the Act was intended to address the concern that schools and libraries might resell current telecommunications services and network capacity, and does not address obsolete equipment. As it is in the public interest and consistent with the Commission's environmental initiatives and the goal of making technology affordable for all, we encourage schools and libraries to donate and recycle their obsolete equipment whenever possible. To further assist this goal, we direct USAC to make available on its website and update on an ongoing basis a list of donation and recycling locations for communications equipment.

60. We adopt the five-year threshold for a number of reasons. We conclude that five years from the date of installation is a reasonable period of time based on the rate of change in communications technology and equipment, industry standards for the

useful life of E-rate eligible equipment, and the need for schools and libraries to maintain viable networks that reflect those changes. Moreover, we find that adopting a straightforward and easy-to-understand rule will help reduce the confusion that has led to applicants either throwing away equipment or to storing the equipment indefinitely because applicants are unsure if disposing of it will violate E-rate rules.

61. We conclude that adopting five years as a minimum threshold standard is superior to attempting to discern a specific useful life for each piece of equipment under E-rate. As the E-rate program supports thousands of different pieces of eligible equipment, and as that equipment and the eligible services list is constantly evolving, the burden of verifying the useful life for each piece of equipment would be unduly onerous. In the *Schools and Libraries Third Report and Order,* we discussed the adoption of useful life criteria in the context of transferring services and equipment. In that context, we decided not to adopt useful life criteria, finding that "developing and enforcing useful life criteria would add a significant degree of complexity to the program, which would result in increased administrative costs and burden for both recipients and USAC." We agree that detailing a specific period of useful life for each of the thousands of types of equipment supported under E-rate would be unduly costly and burdensome.

62. We emphasize that this rule does not require schools and libraries to continue using equipment for five years, nor does it require disposal five years after installation, but it does prohibit resale or disposal before five years has passed. We strongly encourage schools and libraries to be the best stewards of E-rate funding possible and to continue to fully use equipment purchased with universal service funds for as long as the equipment remains viable as an effective and efficient technology solution. Additionally, the New York State Education Department inquired whether the disposal of obsolete equipment by a service provider, free of charge, violates § 54.523 of our rules. We conclude that this service does not provide the incentive or inducement for selection that § 54.523 is designed to prevent, and therefore we find that free of charge disposal of obsolete equipment by a service provider does not violate § 54.523 of our rules.

63. We decline to adopt a time period of three years, as suggested by some commenters. Some schools and libraries transfer equipment from the location that originally sought funding for the equipment to other locations after three years, as permitted by our rules. Those transfers suggest that that equipment may not typically exhaust its useful life within three years. Additionally, although in some instances we allow applicants to receive funding twice every five years to help, in part, allow for updated internal connections, that rule is primarily intended to allow funding to be distributed more equitably. It is not a benchmark for measuring equipment obsolescence.

64. Second, we decline to adopt the proposal that would require applicants to formally declare that equipment is obsolete. Schools and libraries should make this determination in the normal course as they create technology plans and determine what equipment is required to keep the network running efficiently. Each school and library board has its own established procedures for making this determination. We find that a formal declaration would serve little if any value, and would create an unnecessary administrative burden. Therefore, we decline to adopt this proposed condition.

65. Third, we decline to adopt a rule that schools and libraries must notify USAC of the resale or disposal of equipment funded by the E-rate program within 90 days of its disposal, or that applicants be required to keep a record of the disposal for a period of five years following the disposal. We also decline to require schools and libraries to track disposal of obsolete equipment on their asset and inventory lists beyond what the current rules already require. As we decline to adopt the reporting requirement, we see little utility in revising the FCC Form 500 as proposed, and we decline to do so. Because we are convinced that the remaining value of equipment purchased using E-rate funds is generally *de minimis* after five years, we find that such reporting requirements do not justify the substantial administrative burden they would impose on both applicants and USAC. Nevertheless, the purpose of permitting applicants to dispose of equipment for money or other consideration is to encourage recycling and optimization of resources. It is not intended to create a profit-making opportunity for E-rate participants or to create incentives to request services that exceed the applicant's immediate needs. Thus, if we have reason to believe that this revised rule results in waste or abuse, we may impose reporting obligations, recover funding, or take other steps to eliminate opportunities for abuse.

66. Fourth, we decline to adopt, as a condition of compliance with our E-rate rules, a specific rule that the disposal process must comply with state and local laws. While we expect any schools and libraries disposing of obsolete equipment will comply with applicable federal, state, and local laws, we find that making such compliance a condition of our E-rate program requirements would impose significant administrative burdens on USAC to track such compliance, and that such burden outweighs any potential benefit of imposing such a requirement.

67. Finally, we decline to require schools and libraries to return to USAC any funds received in exchange for the sale or disposal of obsolete E-rate equipment. We sought comment on E-rate Central's proposal that would require the return to USAC of any funds greater than $1,000 related to the resale or disposal of E-rate equipment. Because our intent is to permit disposal only of obsolete equipment, we expect that any consideration that schools or libraries receive should be nominal. Thus we find that the potential recovery does not warrant the administrative burdens that USAC and applicants would face as a result of requiring remission of such amounts.

68. *E-Rate Central Petition for Clarification or Waiver.* As discussed in the *E-rate Broadband NPRM,* E-Rate Central filed a petition for clarification or waiver of the Commission's rules concerning the disposal of equipment purchased under the E-rate program. The rules adopted in this order address E-Rate Central's Petition for Clarification or Waiver. Therefore, we dismiss E-Rate Central's petition as moot.

C. Improving Safeguards Against Waste, Fraud and Abuse

69. *Fair and Open Competitive Bidding Rule.* We amend § 54.503 of the Commission's rules to codify the existing requirement that the E-rate competitive bidding process be fair and open. The Commission has observed that competitive bidding is vital to ensuring that schools and libraries—and the E-rate program—receive the best value for their limited funds, and to clarify the prohibition against E-rate applicants receiving gifts. Although numerous Commission orders already make clear that, to comply with the Commission's competitive bidding process requirements, applicants and service providers must conduct and participate in a fair and open competitive bidding process, we find that codification of this requirement is warranted. We remind parties that all

applicants and service providers have had, and will continue to have, an obligation to comply with any applicable state or local procurement laws, in addition to the Commission's requirements.

70. As proposed in the *E-rate Broadband NPRM,* we find that the following types of conduct are necessary to satisfy a fair and open competitive bidding requirement. As a general matter, all potential bidders and service providers must have access to the same information and must be treated in the same manner throughout the procurement process. Any additions or modifications to the FCC Form 470, RFP, or other requirements or specifications must be available to all potential providers at the same time and in a uniform manner. Moreover, consistent with precedent, it is a violation of the Commission's competitive bidding rules if: (1) The applicant has a relationship with a service provider that would unfairly influence the outcome of a competition or would furnish the service provider with "inside" information; (2) someone other than the applicant or an authorized representative of the applicant prepares, signs, and submits the FCC Form 470 and certification; (3) a service provider representative is listed as the FCC Form 470 contact person and that service provider is allowed to participate in the competitive bidding process; or (4) a service provider prepares the applicant's FCC Form 470 or participates in the bid evaluation or vendor selection process in any way. In the *Mastermind Order,* the Commission found that an applicant violates the Commission's competitive bidding rules if the applicant turns over to a service provider the responsibility for ensuring a fair and open competitive bidding process. The Commission concluded in the *SEND Order* that a competitive bidding process is undermined when an applicant employee with a role in the service provider selection process also has an ownership interest in the vendor that is seeking to provide the products or services. In the *Ysleta Order,* the Commission found that an applicant violates the Commission's competitive bidding rules if its FCC Form 470 does not describe the desired products and services with sufficient specificity to enable interested parties to submit responsive bids. We emphasize that this is not an exhaustive summary of the types of conduct that we have found, and will continue to find, to violate the competitive bidding process. Because we cannot anticipate and address every possible action that parties may take in the E-rate application process, we expect that we will continue to use the appeal process as necessary to decide alleged competitive bidding violations.

71. In addition to this precedent, we address the receipt of gifts by applicants from service providers and potential service providers under the E-rate program. As noted above, the Commission's rules and precedent require that applicants conduct a fair and open competitive bidding process. In addition, applicants are required to certify on the FCC Form 471 that they have not received anything of value or a promise of anything of value other than the services and equipment requested on the form. In the *E-rate Broadband NPRM,* we listed gift-giving as one example of prohibited conduct under a fair and open competitive bidding process.

72. We find that the best approach is to make gift rules under the E-rate program consistent with the gift rules applicable to federal agencies, which permit only certain *de minimis* gifts. Generally, the federal rules prohibit a federal employee from directly or indirectly soliciting or accepting a gift (*i.e.,* anything of value) from someone who does business with his or her agency or accepting a gift given as a result of the employee's official position. The federal rules do, however, permit two categories of circumscribed *de minimis* gifts: (1) Modest refreshments that are not offered as part of a meal (*e.g.,* coffee and donuts provided at a meeting) and items with little intrinsic value intended solely for presentation (*e.g.,* certificates and plaques); and (2) items that are worth $20 or less (*e.g.,* pencils, pens, hats, t-shirts, and other items worth less than $20, including meals), as long as those items do not exceed $50 per employee from any one source per calendar year. Similarly, the rule we adopt today also allows such *de minimis* gifts. In determining the amount of gifts from any one source, we will consider the aggregate value of all gifts from any employees, officers, representatives, agents, independent contractors, or directors of the service providers in a given funding year. We note that the restriction on gifts is always applicable, and is not in effect or triggered only during the time period when the competitive bidding process is taking place. Based on our experience, gift activities that undermine the competitive bidding process may occur outside the bidding period. Accordingly, we amend § 54.503 of our rules to prohibit E-rate applicants from soliciting or accepting any gift or other thing of value from a service provider participating in or seeking to participate in the E-rate program. We further amend that rule to make it a violation for any service provider to offer or provide any gift or other thing of value to those personnel of eligible entities involved with the E-rate program. Like the federal rules, we include an exception for gifts to family and personal friends when those gifts are made using personal funds of the donor (without reimbursement from an employer) and are not related to a business transaction or business relationship.

73. We find that the federal rules offer a fair balance between prohibiting gifts that might have undue or improper influence on a procurement decision and acknowledging the realities of professional interactions, which might occasionally involve giving people coffee or other modest refreshments or a token gift. Moreover, the federal rules are well-established and have been interpreted frequently, and parties can look to these decisions if there are questions about the propriety of a particular offering. In addition, we find that this rule is appropriate for ease of administration and also to provide clarity for service providers and applicants. Finally, we emphasize again that schools, libraries, and service providers remain subject to applicable state and local restrictions regarding gifts. Thus, to the extent a state or local provision is more stringent than the federal requirements, violation of the state or local provision constitutes a violation of the Commission rule we adopt herein.

74. AT&T was concerned that a prohibition against gifts might prevent companies from making charitable contributions to schools, or would deter other philanthropic activities, such as employee donations through United Way. The rule we articulate today does not discourage companies from making charitable donations to E-rate eligible entities in the support of schools—including, for example, literacy programs, scholarships, and capital improvements—as long as such contributions are not directly or indirectly related to E-rate procurement activities or decisions. If contributions have no relationship to the procurement of E-rate eligible services and are not given by service providers to circumvent our rules, including rules that require schools and libraries to pay their own non-discount share for the services they are purchasing, such contributions will not violate the prohibition against gift-giving. If applicants or service providers are unclear about a particular anticipated

gift, they should seek guidance from USAC or the FCC.

75. We also offer greater clarity with regard to permissible service provider identification number (SPIN) changes following a competitive bidding process. In the E-rate Broadband *NPRM,* we proposed to prohibit a service provider from circumventing a competitive bidding process by offering a new, lower price for products and services that have already been competitively bid and are part of an existing contract. The Commission currently permits applicants to change service providers for specified reasons (*e.g.,* the service provider went out of business or is unable to perform) after a funding commitment has been issued through the operational SPIN change process. Applicants must wait until after the funding commitment has been issued to enable USAC to review and identify any issues related to the competitive bidding process of the original service provider. There may be some instances, however, where the reason for the SPIN change is not consistent with program purposes. For example, the applicant might identify a service provider as the winning bidder but intend to change providers through the SPIN change process as soon as USAC issues a funding commitment. We believe that this type of conduct is inappropriate and is not conducive to a fair and open competitive bidding process. Therefore, to alleviate uncertainty regarding the types of SPIN changes that are permissible following a competitive bidding process, we clarify that 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.

76. Some commenters challenged the statement in the *E-rate Broadband NPRM* that "[a] service provider may provide information to an applicant about products or services—including demonstrations—before the applicant posts the FCC Form 470, but not during the bid selection process." They argue that applicants need vendor information during the bid selection process in order to make the best decision about the services they are requesting. We agree with these commenters and note that, currently, service providers are permitted to supply information about their products and services during the 28-day waiting period. Our concern regarding vendor communication during the 28-day waiting period was not about the specific products or services being requested, but rather about ensuring that potential bidders are not influencing the bidding process by providing inappropriate assistance as explained above. Thus, we clarify that we do not prohibit communications during the 28-day waiting period as long as all parties are privy to the same information from the applicant during that period and the communications are consistent with any applicable state or local competitive bidding requirements.

III. Eligible Services List

77. In this order, we release the ESL for funding year 2011 and adopt most of the proposals made in the *2009 ESL Further NPRM,* 75 FR 32692, June 9, 2010, and the *2010 ESL Public Notice.* We add dark fiber to the ESL as an eligible service. We also retain web hosting as an eligible priority one service. Finally, we decline to add the following services to the ESL: (1) Software applications that are used in connection with wireless devices; (2) enhanced firewalls and intrusion detection/intrusion prevention devices; (3) anti-virus and anti-spam software; (4) online backup solutions; and (5) unbundled warranties.

78. We also make slight modifications to the rules pertaining to ESL administration. First, as explained below, we find that individual eligible and ineligible services should be listed in the ESL only rather than in our rules. Second, we require USAC to submit any proposed changes to the ESL to the Commission by March 30 of each year. Third, the rules will now provide the Commission with flexibility to release the ESL by public notice or order. Finally, because we are releasing the final ESL for funding year 2011 by this report and order, pursuant to our rules, we also authorize USAC to open the annual application filing window no earlier than November 29, 2010.

79. The Commission uses several criteria to determine whether to include a service in the ESL. First, under the statute, a service must serve an educational purpose. Second, the service should be primarily or significantly used to facilitate connectivity. The E-rate program does not provide support for content or end-user devices such as computers or telephones. Third, due to the financial constraints on the fund, we must balance the benefits of particular services with the costs of adding to our list of supported services—*i.e.,* if more services are eligible for E-rate funding, some schools may receive more funding, but some schools may not receive any funding for priority two services. We recognize that E-rate may not be able to fund every service that potentially serves an educational purpose, and for that reason we need to evaluate potential impact of adding additional services to the eligible services list. Finally, the Commission must exercise discretion in order to balance the goals of the E-rate program with the overarching (and potentially competing) goals of universal service, such as ensuring affordable rates to all Americans across the country. In deciding whether to extend E-rate support to a particular service, the Commission must keep in mind that the support ultimately is paid for by consumers. This balancing bears on each decision about whether to designate a service as eligible or ineligible for E-rate support.

1. Eligible Services

80. *Web Hosting.* Based on the record before us, we find that web hosting should continue to receive priority one funding. Comments provided compelling examples of how web hosting is essential for facilitating teaching and learning as well as communication among the entire school community. For example, teachers use individual web pages to post homework assignments, collect completed homework from students, post messages to students and parents, and respond to student or parent questions. Web pages also can increase learning time outside of school by providing students and parents with 24/7 access to classroom information and supplemental educational resources. Moreover, parental and family engagement in a child's school has been linked to improved educational outcomes for students. Web hosting, as the commenters have shown, is an example of a service that can provide a substantial educational impact for a relatively small cost.

81. We are also persuaded that features that facilitate the ability to communicate, such as blogging, e-mailing over a school or library's hosted website, discussion boards, and services that may facilitate real-time interactive communication such as instant messaging or chat, should be eligible for E-rate funds as part of a web hosting package. Therefore, we revise the ESL to include those features of web hosting. This decision alters prior decisions limiting web hosting support to hosting a school or library's static website and excluded the ability to engage in interactive activity such as blogging. We

recognize that the transfer of messages across a school's hosted website is functionally equivalent to other services that facilitate the ability to communicate such as e-mail, text messaging, voice mail, and paging. We remind applicants, however, that content—including content created by third-party vendors, and any features involving data input or retrieval—including searching of databases for grades, student attendance files, or other reports—remains ineligible. In addition, support for web hosting will not include support for the applications necessary to run online classes or collaborative meetings.

2. Ineligible Services

82. *Wireless Internet Access Applications.* We conclude that wireless Internet access applications should remain ineligible for E-rate support. The E-rate program generally does not provide support for software or applications. Our decision does not contradict the *Schools and Libraries Second Report and Order* determination that wireless telecommunications services *on* a school bus or a library's mobile unit are eligible for E-rate funding, because in that order the Commission decided to fund the telecommunications service used on school buses but not any overlying functionalities or applications. Although some commenters argue that wireless Internet applications should be funded if they are used for an "educational purpose," we find that even if certain of these applications do serve educational purposes, they should not be funded given the overall constraints on the universal service fund, and our desire to maintain the focus of E-rate on its core purpose of ensuring communications connectivity. Thus, we are not persuaded that expanding eligibility to fund wireless Internet access applications at this time is a prudent course of action.

83. We disagree with commenters that applications for wireless devices should be eligible if they are bundled with eligible voice and data services. Such an approach would allow providers in effect to expand the ESL by bundling ineligible wireless applications with eligible services. Although we do not prohibit providers from choosing how to offer their services, individual ineligible services within the bundle will still need to be cost allocated. To the extent that carriers bundle eligible and ineligible services and do not present a reasonable cost allocation between the services, we direct USAC to continue to provide outreach to applicants during the program integrity assurance review process and make determinations based on any additional information provided in the discussions and information-sharing with applicants.

84. Funds for Learning asserts that the language in the draft 2011 ESL appears to say that applicants may not receive discounts on any data charges used for accessing wireless applications. This language was intended to indicate that wireless Internet access service and data charges for a service that is solely dedicated to accessing an ineligible functionality is ineligible for E-rate funding. For example, wireless Internet access service that enables students to access the Internet on a laptop computer will still be eligible for E-rate funding even if that service happens to allow a student to access applications that would not be eligible for E-rate funds. If a wireless Internet access service is dedicated to a service or group of services that are ineligible, however, the entire service request will be deemed ineligible. For example, a wireless service solely dedicated to applications that track the location of a school's bus drivers or student attendance would be fully ineligible.

85. *Enhanced Firewalls, Intrusion Detection/Intrusion Prevention Devices, Anti-Virus and Anti-Spam Software.* Firewall services are intended to prevent unauthorized access to a school or library's network. Anti-virus and anti-spam software and intrusion protection and intrusion prevention devices monitor, detect, and deter threats to a network from external and internal attacks. We decline to extend E-rate support to anti-virus and anti-spam software and intrusion protection and intrusion prevention devices. We will continue to fund basic firewall protection, but we will not at this time extend E-rate support beyond basic firewall protection that is included as part of an Internet access service. While some commenters support greater support for firewall services, contending that such services are necessary protection for Internet services and equipment, we must balance the benefits of such protections with the costs of augmenting our list of supported services. We are concerned about the financial impact on the fund—*i.e.,* if more services are eligible for E-rate funding, fewer schools will get funding for priority two services. Although we agree that protection from unauthorized access is a legitimate concern, the funds available to support the E-rate program are constrained. Therefore, we find that, on balance, the limited E-rate funds should not be used to support these services.

86. *Unbundled Warranties.* We add unbundled warranties to our list of ineligible basic maintenance of internal connections (BMIC). This conforms to the decision we made last year that unbundled warranties are ineligible. The Commission has found that basic maintenance services are eligible for universal service support as priority two internal connections service if, but for the maintenance at issue, the internal connection would not function and serve its intended purpose with the degree of reliability ordinarily provided in the marketplace to entities receiving such services. USAC has treated as an unbundled warranty a separately priced warranty allowing for broken equipment to be fixed or, in the event that the problem is beyond repair, replaced. We find that an unbundled warranty is an ineligible BMIC service because it is purchased as a type of retainer and not as an actual maintenance service. That is, BMIC contracts that require an upfront payment and that payment is required regardless of whether any service is actually performed are not eligible. In light of the limited funds available for the program, we decline to include support for service that may not need to be performed. To avoid the potential waste of E-rate resources, therefore, we will continue to disallow E-rate discounts for unbundled warranties.

87. Requests for basic maintenance will continue to be funded as internal connections if, but for the maintenance at issue, the service would not function and serve its intended purpose with the degree of reliability ordinarily provided in the marketplace to entities receiving such services. Thus, requests for routine maintenance will continue to be funded. In addition, if applicants are able to estimate a certain number of hours per year for maintenance, based on the current life of their equipment and a history of needed repairs and upkeep, they may seek E-rate funds for upfront costs on service contracts designed to cover this estimate of repairs and upkeep. Reimbursements will be paid on the actual work performed and hours used only. For example, if a school determines it will need 30 service hours in a given year to maintain its internal connections but uses only 20 hours, the school will be reimbursed only for 20 hours even if they were approved for E-rate funds on 30 hours. We find that this procedure will ensure that E-rate funds will be used only for actual maintenance performed.

88. We understand from the comments that there may be confusion about the eligibility of manufacturer's warranties. The language in the ESL under the entry for "Miscellaneous Fees and Charges," states that, "a

manufacturer's multi-year warranty provided as an integral part of an eligible component without separately identifiable cost can be included in the cost of the component." We agree with commenters that a manufacturer's warranty of no more than three years that is included in the price of eligible equipment should continue to be eligible as priority two internal connections equipment, and add the clarification of the three year period to the ESL. In the same entry for "Miscellaneous Fees and Charges," however, it states that "[e]xtended warranties and service contracts are eligible only for that portion associated with the relevant funding year." We will remove this language from the ESL for funding year 2011 to eliminate any implication in the ESL that an unbundled warranty may be eligible for E-rate funding.

89. *Other Ineligible Services.* We also decline to designate scheduling services and online backup solutions as eligible for E-rate funding. Given the overall constraints on the universal service fund, and our desire to maintain the focus of E-rate on its core purpose of ensuring communications connectivity, we are not persuaded that expanding eligibility to fund these services at this time is a prudent course of action.

3. Administrative Changes Pertaining to the ESL

90. We adopt the proposal in the *2009 ESL Further NPRM* to restructure our rules such that the services eligible for support will be listed in the ESL and will not specified in the Commission's rules. Any reference to specific services or products in the rules will be removed and the revised rule regarding the ESL will state that all products and services eligible for E-rate support will be listed in the ESL. This change will help the Commission ensure that the ESL is updated in a timely manner. We find that listing general categories of eligible services in the rules and specific types of eligible services that fall within those categories of eligible services in the ESL is confusing. Moreover, it does not serve the public interest to change both the Commission's rules and the ESL each time a new service or product is designated eligible (or ineligible) for E-rate support. Therefore, to alleviate this confusion, we will list the services and products eligible for E-rate support only in the ESL. This change will enable the Commission to modify the ESL only as necessary to keep up with rapidly changing technology. We note that the Commission will continue to seek comment on each funding year's proposed ESL, pursuant to our rules. Additionally, we will modify our rules pertaining to the ESL when necessary to designate new categories of services as eligible for E-rate support.

91. We also adopt the proposal that USAC should be required to submit any proposed changes to the ESL to the Commission by March 30 of each year, instead of June 30. Accordingly, we amend § 54.522 of our rules. We agree with commenters that requiring USAC to submit the proposed ESL earlier will allow additional time for the Commission to review the proposal and to review and analyze public comment on the proposed ESL. Some commenters also propose that we release the ESL earlier than the existing deadline. Although we agree that applicants should have ample time to review the final ESL while they prepare their funding applications, the existing rule requires the final ESL to be released at least 60 days prior to the opening of the funding window. We find that this 60 day period, in addition to the period of time applicants had to review the proposed changes released in the draft ESL, should afford applicants a reasonable amount of time to understand any changes to the ESL and prepare their applications.

92. Finally, we adopt our proposal that the final ESL should no longer be required to be released by public notice. We find that it is important that the Commission have the flexibility to release the ESL through a public notice or an order to account for the situations where the Commission will need to provide more detailed explanations as to why a service is deemed eligible or ineligible for E-rate funding. We wish to dispel any concerns that this change would eliminate the opportunity for public comment on any modifications to the ESL. Indeed, the proposed rule attached to the *2009 ESL Further NPRM* states that "[t]he Wireline Competition Bureau will issue a Public Notice seeking comment on the Administrator's proposed eligible services list," and we adopt that proposed rule herein.

IV. Procedural Matters

A. Final Regulatory Flexibility Analysis

93. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Federal Communications Commission (Commission) included an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities of the policies and rules considered in the *E-rate Broadband NPRM* in CC Docket No. 02–6 and GN Docket No. 09–51. The Commission sought written public comment on the proposals in the *E-rate Broadband NPRM,* including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

B. Need for, and Objectives of, the Report and Order

94. The Commission is required by section 254 of the Communications Act of 1934, as amended, to promulgate rules to implement the universal service provisions of section 254. On May 8, 1997, the Commission adopted rules to reform its system of universal service support mechanisms so that universal service is preserved and advanced as markets move toward competition. Specifically, under the schools and libraries universal service support mechanism, also known as the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may receive discounts for eligible telecommunications services, Internet access, and internal connections.

95. The National Broadband Plan (NBP), issued on March 16, 2010, recommended that the Commission take a fresh look at the E-rate program and identify potential improvements to reflect changes in technology and evolving teaching methods used by schools. In May 2010, the Commission issued a Notice of Proposed Rulemaking seeking public comment on proposals to ensure that the E-rate program continues to help our children and communities prepare for the high-skilled jobs of the future and reap the full benefits of the Internet. In this Report and Order, the Commission adopts a number of the proposals put forward in the *E-rate Broadband NPRM.*

96. The revisions adopted by the Commission in the Report and Order fall into three conceptual categories. First, the Commission enables schools and libraries to better serve students, teachers, librarians, and their communities by providing more flexibility to select and make available the most cost-effective broadband and other communications services. Specifically, the Commission allows applicants to lease fiber from the most cost-effective provider, including not-for-profit entities, so that applicants can choose the services that best meet their needs from a broad set of competitive options and in the most cost-effective manner available in the marketplace. It also changes the rules to permit schools to allow community use of E-rate funded services outside of school hours and supports broadband connections to the residential portion of schools that serve students with special

circumstances. The Commission further indexes E-rate's funding cap to inflation to preserve the purchasing power of a successful program. Additionally, the Commission seeks proposals for a limited pilot program to establish best practices to support off-campus wireless connectivity for portable learning devices outside of regular school or library operating hours. Second, the Commission simplifies and streamlines the E-rate application process by removing the technology plan requirement for priority one telecommunications and Internet access services, and facilitating the disposal and recycling of obsolete equipment supported by E-rate by authorizing schools and libraries to receive consideration for such equipment. Third, the Commission improves safeguards against waste, fraud, and abuse by codifying the requirement that competitive bidding processes be fair and open. In addition, the Commission adopts the eligible services list for funding year 2011.

97. As a result of these changes, schools and libraries throughout the country can make their limited dollars go further. The changes adopted in this Report and Order will increase the ability of students and the public to utilize broadband services for educational needs. In addition, the changes to simplify the E-rate program will help reduce the cost of participating in the program, thereby making the program more accessible, particularly to smaller school districts and libraries that are often located in more rural areas and may not have staff dedicated to managing E-rate applications and related activities.

C. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

98. No comments specifically addressed the IRFA.

D. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

99. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A small business concern is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA. A "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." Nationwide, as of 2002, there were approximately 1.6 million small organizations. The term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States. We estimate that, of this total, 84,377 entities were "small governmental jurisdictions." Thus, we estimate that most governmental jurisdictions are small.

100. Small entities potentially affected by the proposals herein include eligible schools and libraries and the eligible service providers offering them discounted services, including telecommunications service providers, Internet Service Providers (ISPs), and vendors of the services and equipment used for internal connections.

a. Schools

101. As noted, "small entity" includes non-profit and small governmental entities. Under the schools and libraries universal service support mechanism, which provides support for elementary and secondary schools, an elementary school is generally "a non-profit institutional day or residential school that provides elementary education, as determined under state law." A secondary school is generally defined as "a non-profit institutional day or residential school that provides secondary education, as determined under state law," and not offering education beyond grade 12. For-profit schools, and schools and libraries with endowments in excess of $50,000,000, are not eligible to receive discounts under the program. Certain other restrictive definitions apply as well. The SBA has also defined for-profit, elementary and secondary schools having $7 million or less in annual receipts as small entities. In funding year 2007, approximately 105,500 schools received funding under the schools and libraries universal service mechanism. Although we are unable to estimate with precision the number of these additional entities that would qualify as small entities under SBA's size standard, we estimate that fewer than 105,500 such schools might be affected annually by our action, under current operation of the program.

b. Telecommunications Service Providers

102. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small incumbent local exchange services. The closest size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,311 incumbent carriers reported that they were engaged in the provision of local exchange services. Of these 1,311 carriers, an estimated 1,024 have 1,500 or fewer employees and 287 have more than 1,500 employees. Thus, under this category and associated small business size standard, we estimate that the majority of entities are small.

103. We have included small incumbent local exchange carriers in this RFA analysis. A "small business" under the RFA is one that, *inter alia,* meets the pertinent small business size standard (*e.g.,* a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope. We have therefore included small incumbent carriers in this RFA analysis, although we emphasize that this RFA action has no effect on the Commission's analyses and determinations in other, non-RFA contexts.

104. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under the SBA rules is for wired telecommunications carriers. This provides that a wired telecommunications carrier is a small entity if it employs no more than 1,500 employees. According to the Commission's *2008 Trends Report,* 300 companies reported that they were engaged in the provision of interexchange services. Of these 300 IXCs, an estimated 268 have 1,500 or fewer employees and 32 have more than 1,500 employees. Consequently, the Commission estimates that most providers of interexchange services are small businesses.

105. *Competitive Access Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to competitive access services providers (CAPs). The closest applicable definition under the SBA rules is for wired telecommunications carriers. This provides that a wired telecommunications carrier is a small entity if it employs no more than 1,500 employees. According to the *2008 Trends Report,* 1,005 CAPs and competitive local exchange carriers (competitive LECs) reported that they were engaged in the provision of competitive local exchange services. Of these 1,005 CAPs and competitive LECs, an estimated 918 have 1,500 or fewer employees and 87 have more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive exchange services are small businesses.

106. *Wireless Telecommunications Carriers (except Satellite).* Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category. Prior to that time, such firms were within the now-superseded categories of "Paging" and "Cellular and Other Wireless Telecommunications." Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior categories and associated data. For the category of Paging, data for 2002 show that there were 807 firms that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. For the category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year. Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more. Thus, we estimate that the majority of wireless firms are small.

107. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite). Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to the *2008 Trends Report,* 434 carriers reported that they were engaged in wireless telephony. Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees. We have estimated that 222 of these are small under the SBA small business size standard.

108. *Common Carrier Paging.* As noted, since 2007 the Census Bureau has placed paging providers within the broad economic census category of Wireless Telecommunications Carriers (except Satellite). Prior to that time, such firms were within the now-superseded category of "Paging." Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior category and associated data. The data for 2002 show that there were 807 firms that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. Thus, we estimate that the majority of paging firms are small.

109. In addition, in the *Paging Second Report and Order,* the Commission adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. The SBA has approved this definition. An initial auction of Metropolitan Economic Area ("MEA") licenses was conducted in the year 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. A subsequent auction of MEA and Economic Area ("EA") licenses was held in the year 2001. Of the 15,514 licenses auctioned, 5,323 were sold. One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs, was held in 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.

110. Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service,* 281 carriers reported that they were engaged in the provision of "paging and messaging" services. Of these, an estimated 279 have 1,500 or fewer employees and two have more than 1,500 employees. We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

c. Internet Service Providers

111. The 2007 Economic Census places these firms, whose services might include voice over Internet protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider's own telecommunications facilities (*e.g.,* cable and DSL ISPs), or over client-supplied telecommunications connections (*e.g.,* dial-up ISPs). The former are within the category of Wired Telecommunications Carriers, which has an SBA small business size standard of 1,500 or fewer employees. The latter are within the category of All Other Telecommunications, which has a size standard of annual receipts of $25 million or less. The most current Census Bureau data for all such firms, however, are the 2002 data for the previous census category called Internet Service Providers. That category had a small business size standard of $21 million or less in annual receipts, which was revised in late 2005 to $23 million. The 2002 data show that there were 2,529 such firms that operated for the entire year. Of those, 2,437 firms had annual receipts of under $10 million, and an additional 47 firms had receipts of between $10 million and $24, 999,999. Consequently, we estimate that the majority of ISP firms are small entities.

d. Vendors of Internal Connections

112. *Telephone Apparatus Manufacturing.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in manufacturing wire telephone and data communications equipment. These products may be standalone or board-level components of a larger system. Examples of products made by these establishments are central office switching equipment, cordless telephones (except cellular), PBX equipment, telephones, telephone answering machines, LAN modems, multi-user modems, and other data communications equipment, such as bridges, routers, and gateways." The SBA has developed a small business size standard for Telephone Apparatus Manufacturing, which is: All such firms having 1,000 or fewer employees. According to Census Bureau data for 2002, there were a total of 518 establishments in this category that operated for the entire year. Of this total, 511 had employment of under 1,000, and an additional seven had employment of 1,000 to 2,499. Thus,

under this size standard, the majority of firms can be considered small.

113. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: Transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment." The SBA has developed a small business size standard for firms in this category, which is: All such firms having 750 or fewer employees. According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year. Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999. Thus, under this size standard, the majority of firms can be considered small.

114. *Other Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in manufacturing communications equipment (except telephone apparatus, and radio and television broadcast, and wireless communications equipment)." The SBA has developed a small business size standard for Other Communications Equipment Manufacturing, which is: All such firms having 750 or fewer employees. According to Census Bureau data for 2002, there were a total of 503 establishments in this category that operated for the entire year. Of this total, 493 had employment of under 500, and an additional 7 had employment of 500 to 999. Thus, under this size standard, the majority of firms can be considered small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

115. In the Report and Order, the Commission establishes a trial program—E-rate Deployed Ubiquitously (EDU) 2011 Pilot Program—to investigate the merits and challenges of wireless off-premises connectivity services, and to help the Commission determine whether they should ultimately be eligible for E-rate support. To be considered for first phase EDU2011 Program funding, E-rate eligible applicants must have implemented or already be in the process of implementing a program to provide off-premise connectivity to students or library patrons through the use of portable wireless devices. Applicants also must submit certain information to the Wireline Competition Bureau for review and consideration as part of the application process as part of this trial program. Specifically, the application must contain the following information:

(1) A description of the current or planned program, how long it has been in operation, and a description of any improvements or other changes that would be made if E-rate funding were received for funding year 2011 (July 1, 2011–June 30, 2012);

(2) Identification of the costs associated with implementing the program including, for example, costs for equipment such as e-readers or laptops, access and connection charges, teacher training, librarian training, or student/parent training;

(3) Relevant technology plans;

(4) A description of how the program complies with the Children's Internet Protection Act (CIPA) and adequately protects against waste, fraud, and abuse;

(5) A copy of internal policies and enforcement procedures governing acceptable use of the wireless device off the school's or library's premises;

(6) For schools, a description of the program's curriculum objectives, the grade levels included, and the number of students and teachers involved in the program; and

(7) For schools, any data collected on program outcomes.

As indicated above, we have assessed the effects of this trial program and find that any information submitted by the applicants to the Commission as part of this program will not significantly impact the burden on small businesses. The trial program is limited to schools and libraries that are already implementing or experimenting with wireless off-campus learning; therefore, any information collected from participants in this program is limited to information about their current projects.

F. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

116. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance and reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or part thereof, for small entities.

117. In this Report and Order, as detailed above, the Commission adopts a number of the proposals put forward in the *E-rate Broadband NPRM* to help realize the NBP's vision of improving connectivity to schools and libraries by upgrading and modernizing the successful E-rate program. We believe the reforms adopted in this Report and Order will not have a significant economic impact on small entities under the E-rate program. Rather, the reforms will benefit small entities by simplifying the application process, providing more flexibility to select and make available the most cost-effective broadband and other communications services, and improving safeguards against waste, fraud, and abuse, while ensuring that the amount of funding available keeps pace with the rate of inflation. Because this Report and Order does not adopt additional regulation for service providers and equipment vendors, these small entities will experience no significant additional burden.

G. Report to Congress

118. The Commission will send a copy of the Second Report and Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the Second Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Second Report and Order and FRFA (or summaries thereof) will also be published in the **Federal Register**.

H. Paperwork Reduction Act Analysis

119. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection

burden for small business concerns with fewer than 25 employees.

120. In this present document, we establish a trial program to investigate the merits and challenges of wireless off-premises connectivity services, and to help us determine whether and how they should ultimately be eligible for E-rate support. We have assessed the effects of this trial program and find that any information submitted by the applicants to the Commission as part of this program will not significantly impact the burden on small businesses. The trial program is limited to schools and libraries that are already implementing or planning to implement wireless off-campus learning; therefore, any information collected from participants in this program is limited to information about their current projects.

I. Congressional Review Act

121. The Commission will include a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 54

Communications Common Carriers, Health Facilities, Infants and Children, Libraries, Reporting and Recordkeeping requirements, Schools, Telecommunications, Telephone.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 54 as follows:

PART 54—UNIVERSAL SERVICE

■ 1. The authority citation continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 201, 205, 214, and 254 unless otherwise noted.

■ 2. Amend § 54.501 by revising the section heading, removing paragraph (a), redesignating paragraphs (b), (c), and (d) as paragraphs (a), (b), and (c), and revising newly redesignated paragraphs (a)(1), (b)(1), and (c)(1) to read as follows:

§ 54.501 Eligible recipients.

(a) *Schools.* (1) Only schools meeting the statutory definitions of "elementary school," as defined in 20 U.S.C. 7801(18), or "secondary school," as defined in 20 U.S.C. 7801(38), and not excluded under paragraphs (a)(2) or (3) of this section shall be eligible for discounts on telecommunications and other supported services under this subpart.

* * * * *

(b) *Libraries.* (1) Only libraries eligible for assistance from a State library administrative agency under the Library Services and Technology Act (Pub. L. 104–208) and not excluded under paragraphs (b)(2) or (3) of this section shall be eligible for discounts under this subpart.

* * * * *

(c) *Consortia.* (1) For purposes of seeking competitive bids for supported services, schools and libraries eligible for support under this subpart may form consortia with other eligible schools and libraries, with health care providers eligible under subpart G, and with public sector (governmental) entities, including, but not limited to, state colleges and state universities, state educational broadcasters, counties, and municipalities, when ordering telecommunications and other supported services under this subpart. With one exception, eligible schools and libraries participating in consortia with ineligible private sector members shall not be eligible for discounts for interstate services under this subpart. A consortium may include ineligible private sector entities if the pre-discount prices of any services that such consortium receives are generally tariffed rates.

* * * * *

■ 3. Revise § 54.502 to read as follows:

§ 54.502 Eligible services.

(a) *Supported services.* Supported services are listed in the Eligible Services List as updated annually in accordance with paragraph (b) of this section. The services in this subpart will be supported in addition to all reasonable charges that are incurred by taking such services, such as state and federal taxes. Charges for termination liability, penalty surcharges, and other charges not included in the cost of taking such service shall not be covered by the universal service support mechanisms. These supported services fall within the following general categories:

(1) *Telecommunications services.* For purposes of this subpart, supported telecommunications services provided by telecommunications carriers include all commercially available telecommunications services.

(2) *Telecommunications.* For purposes of this subpart, supported telecommunications can be provided in whole or in part via fiber by any entity.

(3) *Internet access.* For purposes of this subpart, Internet access is as defined in § 54.5.

(4) *Internal connections and basic maintenance.* (i) For purposes of this subpart, a service is eligible for support as a component of an institution's internal connections if such service is necessary to transport information within one or more instructional buildings of a single school campus or within one or more non-administrative buildings that comprise a single library branch. Discounts are not available for internal connections in non-instructional buildings of a school or school district, or in administrative buildings of a library, to the extent that a library system has separate administrative buildings, unless those internal connections are essential for the effective transport of information to an instructional building of a school or to a non-administrative building of a library or the Commission has found that the use of those services meets the definition of educational purpose. Internal connections do not include connections that extend beyond a single school campus or single library branch. There is a rebuttable presumption that a connection does not constitute an internal connection if it crosses a public right-of-way.

(ii) For purposes of this subpart, basic maintenance services shall be eligible as an internal connections service if, but for the maintenance at issue, the internal connection would not function and serve its intended purpose with the degree of reliability ordinarily provided in the marketplace to entities receiving such services. Basic maintenance services do not include services that maintain equipment that is not supported or that enhance the utility of equipment beyond the transport of information, or diagnostic services in excess of those necessary to maintain the equipment's ability to transport information.

(iii) Each eligible school or library shall be eligible for support for internal connections services, except basic maintenance services, no more than twice every five funding years. For the purpose of determining eligibility, the five-year period begins in any funding year in which the school or library receives discounted internal connections services other than basic maintenance services. If a school or library receives internal connections services other than basic maintenance services that are shared with other schools or libraries (for example, as part of a consortium), the shared services will be attributed to the school or library

in determining whether it is eligible for support.

(b) *Eligible Services List.* (1) The Administrator shall submit by March 30 of each year a draft list of services eligible for support, based on the Commission's rules for the following funding year. The Wireline Competition Bureau will issue a Public Notice seeking comment on the Administrator's proposed eligible services list. At least 60 days prior to the opening of the window for the following funding year, the final list of services eligible for support will be released.

(2) All supported services are listed in the Eligible Services List as updated annually in accordance with paragraph (b)(1) of this section.

■ 4. Revise § 54.503 to read as follows:

§ 54.503 Competitive bidding requirements.

(a) All entities participating in the schools and libraries universal service support program must conduct a fair and open competitive bidding process, consistent with all requirements set forth in this subpart. Note to paragraph (a): The following is an illustrative list of activities or behaviors that would not result in a fair and open competitive bidding process: the applicant for supported services has a relationship with a service provider that would unfairly influence the outcome of a competition or would furnish the service provider with inside information; someone other than the applicant or an authorized representative of the applicant prepares, signs, and submits the FCC Form 470 and certification; a service provider representative is listed as the FCC Form 470 contact person and allows that service provider to participate in the competitive bidding process; the service provider prepares the applicant's FCC Form 470 or participates in the bid evaluation or vendor selection process in any way; the applicant turns over to a service provider the responsibility for ensuring a fair and open competitive bidding process; an applicant employee with a role in the service provider selection process also has an ownership interest in the service provider seeking to participate in the competitive bidding process; and the applicant's FCC Form 470 does not describe the supported services with sufficient specificity to enable interested service providers to submit responsive bids.

(b) *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. 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.

(c) *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 to initiate the competitive bidding process. The FCC Form 470 and any request for proposal cited in the FCC Form 470 shall include, at a minimum, the following information, to the extent applicable with respect to the services requested:

(i) A list of specified services for which the school, library, or consortia including such entities, anticipates they are likely to seek discounts; and

(ii) Sufficient information to enable bidders to reasonably determine the needs of the applicant.

(2) The FCC Form 470 shall be signed by the person authorized to order eligible services for the eligible school, library, or consortium including such entities 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 or will be covered by:

(A) Technology plans for using the services requested in the application; or

(B) No technology plan is required by Commission rules.

(iv) To the extent a technology plan is required by § 54.508, the technology plan(s) has/have been/will be approved consistent with § 54.508.

(v) The services the school, library, or consortium purchases at discounts will be used primarily for educational purposes and will not be sold, resold, or transferred in consideration for money or any other thing of value, except as allowed by § 54.513.

(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 for eligible products and services will be carefully considered, with price being the primary factor, and the bid selected will be for the most cost-effective service offering consistent with § 54.511.

(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).

(d) *Gift Restrictions.* (1) Subject to paragraphs (d)(3) and (4) of this section, an eligible school, library, or consortium that includes an eligible school or library may not directly or indirectly solicit or accept any gift, gratuity, favor, entertainment, loan, or any other thing of value from a service provider participating in or seeking to participate in the schools and libraries universal service program. No such service provider shall offer or provide any such gift, gratuity, favor, entertainment, loan, or other thing of value except as otherwise provided herein. Modest refreshments not offered as part of a meal, items with little intrinsic value intended solely for presentation, and items worth $20 or less, including meals, may be offered or provided, and accepted by any individuals or entities subject to this rule, if the value of these items received by any individual does not exceed $50 from any one service provider per funding year. The $50 amount for any service provider shall be calculated as the aggregate value of all gifts provided during a funding year by the individuals specified in paragraph (d)(2)(ii) of this section.

(2) For purposes of this paragraph:

(i) The terms "school, library, or consortium" include all individuals who are on the governing boards of such

entities (such as members of a school committee), and all employees, officers, representatives, agents, consultants or independent contractors of such entities involved on behalf of such school, library, or consortium with the Schools and Libraries Program of the Universal Service Fund (E-rate Program), including individuals who prepare, approve, sign or submit E-rate applications, technology plans, or other forms related to the E-rate Program, or who prepare bids, communicate or work with E-rate service providers, E-rate consultants, or with USAC, as well as any staff of such entities responsible for monitoring compliance with the E-rate Program; and

(ii) The term "service provider" includes all individuals who are on the governing boards of such an entity (such as members of the board of directors), and all employees, officers, representatives, agents, or independent contractors of such entities.

(3) The restrictions set forth in this paragraph shall not be applicable to the provision of any gift, gratuity, favor, entertainment, loan, or any other thing of value, to the extent given to a family member or a friend working for an eligible school, library, or consortium that includes an eligible school or library, provided that such transactions:

(i) Are motivated solely by a personal relationship,

(ii) Are not rooted in any service provider business activities or any other business relationship with any such eligible school, library, or consortium, and

(iii) Are provided using only the donor's personal funds that will not be reimbursed through any employment or business relationship.

(4) Any service provider may make charitable donations to an eligible school, library, or consortium that includes an eligible school or library in the support of its programs as long as such contributions are not directly or indirectly related to E-rate procurement activities or decisions and are not given by service providers to circumvent competitive bidding and other E-rate program rules, including those in paragraph (c)(2)(vi) of this section, requiring schools and libraries to pay their own non-discount share for the services they are purchasing.

■ 5. Revise § 54.504 to read as follows:

§ 54.504 Requests for services.

(a) *Filing of the 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 an FCC Form 471.

(1) The FCC Form 471 shall be signed by the person authorized to order eligible 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 or will be covered by:

(A) Technology plan(s) for using the services requested in the application; or

(B) No technology plan is required by Commission rules.

(v) To the extent a technology plan is required by § 54.508, status of technology plan(s) has/have been approved or will be approved by a state or other authorized body.

(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 school, library, or consortium purchases at discounts will be used primarily for educational purposes and will not be sold, resold, or transferred in consideration for money or any other thing of value, except as allowed by § 54.513.

(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 to a school, library, or consortium seeking eligible services were carefully considered and the most cost-effective bid was selected in accordance with § 54.503 of this subpart, with price being the primary factor considered, and is the most cost-effective means of meeting educational needs and technology plan goals.

(2) [Reserved]

(b) *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.

(c) *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.

(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.

(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.

(e) *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 paragraph (e)(1) of this section.

(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. The 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.

■ 6. Amend § 54.505 by revising paragraph (b)(4) to read as follows:

§ 54.505 Discounts.

* * * * *

(b) * * *

(4) School districts, library systems, or other billed entities shall calculate discounts on supported services described in § 54.502(b) that are shared by two or more of their schools, libraries, or consortia members by calculating an average based on the applicable discounts of all member schools and libraries. School districts, library systems, or other billed entities shall ensure that, for each year in which an eligible school or library is included for purposes of calculating the aggregate discount rate, that eligible school or library shall receive a proportionate share of the shared services for which support is sought. For schools, the average discount shall be a weighted average of the applicable discount of all schools sharing a portion of the shared services, with the weighting based on the number of students in each school. For libraries, the average discount shall be a simple average of the applicable discounts to which the libraries sharing a portion of the shared services are entitled.

* * * * *

§ 54.506 [Removed and Reserved]

■ 7. Remove and reserve § 54.506.

■ 8. Amend § 54.507 by revising paragraphs (a), (g) introductory text, and (g)(1)(i), to read as follows:

§ 54.507 Cap.

(a) *Amount of the annual cap.* In funding year 2010 and subsequent funding years, the $2.25 billion funding cap on federal universal service support for schools and libraries shall be automatically increased annually to take into account increases in the rate of inflation as calculated in paragraph (a)(1) of this section.

(1) *Increase Calculation.* To measure increases in the rate of inflation for the purposes of this paragraph (a), the Commission shall use the Gross Domestic Product Chain-type Price Index (GDP–CPI). To compute the annual increase as required by this paragraph (a), the percentage increase in the GDP–CPI from the previous year will be used. For instance, the annual increase in the GDP–CPI from 2008 to 2009 would be used for the 2010 funding year. The increase shall be rounded to the nearest 0.1 percent by rounding 0.05 percent and above to the next higher 0.1 percent and otherwise rounding to the next lower 0.1 percent. This percentage increase shall be added to the amount of the annual funding cap from the previous funding year. If the yearly average GDP–CPI decreases or stays the same, the annual funding cap shall remain the same as the previous year.

(2) *Public notice.* When the calculation of the yearly average GDP–CPI is determined, the Wireline Competition Bureau shall publish a public notice in the **Federal Register** within 60 days announcing any increase of the annual funding cap based on the rate of inflation.

(3) *Amount of unused funds.* All funds collected that are unused shall be carried forward into subsequent funding years for use in the schools and libraries support mechanism in accordance with the public interest and notwithstanding the annual cap.

(i) The Administrator shall report to the Commission, on a quarterly basis, funding that is unused from prior years of the schools and libraries support mechanism.

(ii) *Application of unused funds.* On an annual basis, in the second quarter of each calendar year, all funds that are collected and that are unused from prior years shall be available for use in the next full funding year of the schools and libraries mechanism in accordance with the public interest and notwithstanding

the annual cap as described in this paragraph (a).

* * * * *

(g) *Rules of priority.* The Administrator shall act in accordance with paragraph (g)(1) of this section with respect to applicants that file an FCC Form 471, as described in § 54.504(a), when a filing period described in paragraph (c) of this section is in effect. The Administrator shall act in accordance with paragraph (g)(2) of this section with respect to applicants that file an FCC Form 471, as described in § 54.504(a), at all times other than within a filing period described in paragraph (c) of this section.

(1) * * *

(i) Schools and Libraries Corporation shall first calculate the demand for telecommunications, telecommunications services, voice-mail, and Internet access for all discount categories as determined by the schools and libraries discount matrix in § 54.505(c). These services shall receive first priority for the available funding.

* * * * *

■ 9. Revise § 54.508 to read as follows:

§ 54.508 Technology plans.

(a) Applicants must develop a technology plan when requesting discounts for internal connections and basic maintenance for internal connections. Applicants must document the date on which the technology plan was created. The technology plan must include the following elements:

(1) A clear statement of goals and a realistic strategy for using telecommunications and information technology to improve education or library services;

(2) A professional development strategy to ensure that the staff understands how to use these new technologies to improve education or library services;

(3) An assessment of the telecommunication services, hardware, software, and other services that will be needed to improve education or library services; and

(4) An evaluation process that enables the school or library to monitor progress toward the specified goals and make mid-course corrections in response to new developments and opportunities as they arise.

(b) *Relevance of approval under Enhancing Education through Technology.* Technology plans that meet the standards of the U.S. Department of Education's Enhancing Education Through Technology (EETT), 20 U.S.C. 6764, are sufficient for satisfying paragraphs (a)(1) through (4) of this section. Furthermore, to the extent that the U.S. Department of Education adopts future technology plan requirements that require one or more of the four elements described in paragraph (a) of this section, such plans will be acceptable for satisfying those elements of paragraph (a) of this section. Applicants with such plans will only need to supplement such plans with the analysis needed to satisfy those elements of paragraph (a) of this section not covered by the future Department of Education technology plan requirements.

(c) *Timing of certification.* As required under §§ 54.503(c)(2)(iii) and 54.504(a)(1)(iv), applicants must certify that they have prepared any required technology plans. They must also confirm, in FCC Form 486, that their plan was approved before they began receiving services pursuant to it.

(d) *Parties qualified to approve technology plans required in this subpart.* Applicants required to prepare and obtain approval of technology plans under this subpart must obtain such approval from either their state, the Administrator, or an independent entity approved by the Commission or certified by the Administrator as qualified to provide such approval. All parties who will provide such approval must apply the standards set forth in paragraphs (a) and (b) of this section.

■ 10. Amend § 54.511 by revising paragraphs (a), (c)(1) introductory text, (c)(1)(ii), and (d)(1), and removing paragraph (c)(3).

The revisions read as follows:

§ 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 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.

* * * * *

(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 § 54.503 as follows:

* * * * *

(ii) A contract signed after July 10, 1997, but before the date on which the universal service competitive bid system described in § 54.503 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.

* * * * *

(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.

* * * * *

■ 11. Amend § 54.513 by revising paragraph (a) and redesignating paragraphs (b) and (c) as paragraphs (c) and (d) and adding new paragraph (b) to read as follows:

§ 54.513 Resale and transfer of services.

(a) *Prohibition on resale.* Eligible supported services provided at a discount under this subpart shall not be sold, resold, or transferred in consideration of money or any other thing of value, except as provided in paragraph (b) of this section.

(b) *Disposal of obsolete equipment components of eligible services.* Eligible equipment components of eligible services purchased at a discount under this subpart shall be considered obsolete if the equipment components have has been installed for at least five years. Obsolete equipment components of eligible services may be resold or transferred in consideration of money or any other thing of value, disposed of, donated, or traded.

* * * * *

§ 54.517 [Removed and Reserved]

■ 12. Remove and Reserve § 54.517.

■ 13. Revise § 54.518 to read as follows:

§ 54.518 Support for wide area networks.

To the extent that schools, libraries or consortia that include an eligible school or library build or purchase a wide area network to provide telecommunications services, the cost of such wide area networks shall not be eligible for universal service discounts provided under this subpart.

■ 14. Revise § 54.519 by revising paragraphs (a) introductory text, (a)(6), and (b) to read as follows:

§ 54.519 State telecommunications networks.

(a) *Telecommunications services.* State telecommunications networks may secure discounts under the universal service support mechanisms on supported telecommunications services

(as described in § 54.502(a)) on behalf of eligible schools and libraries (as described in § 54.501) or consortia that include an eligible school or library. Such state telecommunications networks shall pass on such discounts to eligible schools and libraries and shall:

* * * * *

(6) Comply with the competitive bid requirements set forth in § 54.503.

(b) *Internet access and installation and maintenance of internal connections.* State telecommunications networks either may secure discounts on Internet access and installation and maintenance of internal connections in the manner described in paragraph (a) of this section with regard to telecommunications, or shall be eligible, consistent with § 54.502(a), to receive universal service support for providing such services to eligible schools, libraries, and consortia including those entities.

§ 54.522 [Removed and Reserved]

■ 15. Remove and reserve § 54.522.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 0906221072–91425–02]

RIN 0648–XA052

Atlantic Highly Migratory Species; Inseason Action To Close the Commercial Non-Sandbar Large Coastal Shark Fishery in the Atlantic Region

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Fishery closures.

SUMMARY: NMFS is closing the commercial fishery for non-sandbar large coastal sharks (LCS) in the Atlantic region. This action is necessary because landings in this fishery have exceeded 80 percent of the available quota.

DATES: The commercial non-sandbar LCS fishery in the Atlantic region is closed effective 11:30 p.m. local time, December 5, 2010, until the effective date of the final 2011 shark season specifications, which NMFS will publish as a separate document in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Karyl Brewster-Geisz or Guy DuBeck, 301–713–2347; (fax) 301–713–1917.

SUPPLEMENTARY INFORMATION: The Atlantic shark fisheries are managed under the 2006 Consolidated Atlantic Highly Migratory Species (HMS) Fishery Management Plan (FMP), its amendments, and its implementing regulations found at 50 CFR part 635 issued under authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*).

Under § 635.5(b)(1), shark dealers are required to report to NMFS all sharks landed every two weeks. Dealer reports for fish received between the 1st and 15th of any month must be received by NMFS by the 25th of that month. Dealer reports for fish received between the 16th and the end of any month must be received by NMFS by the 10th of the following month. Under § 635.28(b)(2), when NMFS projects that fishing season landings for a species group have reached or are about to reach 80 percent of the available quota, NMFS will file for publication with the Office of the Federal Register a notice of closure for that shark species group that will be effective no fewer than 5 days from the date of filing. From the effective date and time of the closure until NMFS announces, via a notice in the **Federal Register**, that additional quota is available and the season is reopened, the fishery for that species group is closed, even across fishing years.

On January 5, 2010 (75 FR 250), NMFS announced that the non-sandbar LCS fishery quota in the Atlantic region for the 2010 fishing year would be 169.7 metric tons (mt) dressed weight (dw) (374,121 lb dw). Dealer reports through October 31, 2010, indicate that 142 mt dw or 83.6 percent of the available quota for non-sandbar LCS Atlantic fishery has been landed. The fishery has to date reached 83.6 percent of the quota, which exceeds the 80 percent limit specified in the regulations. Dealer reports received to date indicate that 13.1 percent of the quota was landed from the opening of the fishery on July 15, 2010, through July 31, 2010; 31.9 percent of the quota was landed in August; 22.9 percent of the quota was landed in September; and 15.7 percent of the quota was landed in October. Accordingly, NMFS is closing the commercial non-sandbar LCS fishery in the Atlantic region as of 11:30 p.m. local time, December 5, 2010. This closure does not affect any other shark fishery.

As such, as of 11:30 p.m. local time, December 5, 2010, all commercial non-sandbar LCS fisheries in all regions and fisheries will be closed. All of the pelagic shark fisheries will remain open.

During this closure, a fishing vessel, issued an Atlantic Shark LAP, pursuant to § 635.4, may not possess or sell a non-sandbar LCS. A shark dealer, issued a permit pursuant to § 635.4, may not purchase or receive non-sandbar LCS from a vessel issued an Atlantic Shark LAP, except that a permitted shark dealer or processor may possess sharks that were harvested, off-loaded, and sold, traded, or bartered, prior to the effective date of the closure and were held in storage. Additionally, a shark dealer issued a Federal permit, pursuant to § 635.4, may in accordance with state regulations, purchase or receive a non-sandbar LCS if the shark was harvested, off-loaded, and sold, traded, or bartered from a vessel that fishes only in state waters and had not been issued an Atlantic Shark LAP, HMS Angling permit, or HMS Charter/Headboat permit pursuant to § 635.4.

Classification

Pursuant to 5 U.S.C. 553(b)(B), the Assistant Administrator for Fisheries, NOAA (AA), finds that providing for prior notice and public comment for this action is impracticable and contrary to the public interest because the fisheries are currently under way, and any delay in this action would cause overharvest of the quotas and be inconsistent with management requirements and objectives. Similarly, affording prior notice and opportunity for public comment on this action is contrary to the public interest because if the quotas are exceeded, the affected public is likely to experience reductions in the available quotas and a lack of fishing opportunities in future seasons. Thus, for these reasons, the AA also finds good cause to waive the 30-day delay in effective date pursuant to 5 U.S.C. 553(d)(3). This action is required under 50 CFR 635.28(b)(2) and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 30, 2010.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

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