Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of	)	
	)	
Promoting Fair and Open Competitive Bidding Competitive Bidding in the E-Rate Program	)	WC Docket No. 21-455
	)	
	)	
Schools and Libraries Universal Service Support Mechanism	)	CC Docket No. 02-6

SCHOOLS, HEALTH & LIBRARIES BROADBAND COALITION
PETITION FOR RECONSIDERATION OF
THE E-RATE BIDDING PORTAL REPORT AND ORDER

The Schools, Health & Libraries Broadband Coalition (SHLB)[1] petitions for reconsideration of the E-Rate Bidding Portal Report and Order (*Report and Order*),[2] pursuant to 47 C.F.R. §1.429, because the Federal Communications Commission's (FCC or Commission) substantive analysis and procedural approach was arbitrary and capricious.

In support thereof, the following is respectfully submitted:

[1] The SHLB Coalition is a nonprofit, 501(c)(3) advocacy organization that supports open, affordable, high-quality broadband connections for anchor institutions and their surrounding communities. The SHLB Coalition is based in Washington, D.C., and has a diverse membership of commercial and non-commercial organizations across the United States. To learn more, visit www.shlb.org.

[2] *Promoting Fair and Open Competitive Bidding in the E-Rate Program*, WC Docket No. 21-455, 02-6, Report and Order and Order on Reconsideration, (rel. May 1, 2026) (*Report and Order*).

I. THE FCC'S BIDDING PORTAL ORDER VIOLATES THE RULEMAKING REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT.

The FCC must exercise its rulemaking authority under the Administrative Procedure Act by providing sufficient notice and opportunity for comment. 5 U.S.C. §553. The rulemaking is subject to reversal upon appellate review for arbitrary and capricious results that reflect an abuse of discretion. 5 U.S.C. §706.

The FCC's *Report and Order* was adopted without affording interested parties sufficient notice and opportunity for comment. The significant changes made in the *Report and Order* are not a logical outgrowth of the proposals in the *Bidding Portal NPRM.*[3] The final rules are arbitrary and capricious because they are not supported by current facts and evidence which although brought to the attention of the FCC, were ignored. Instead, the FCC relied on outdated evidence and information that is no longer accurate. The agency's action improperly dismissed numerous parties' comments that the final rules will conflict with existing state procurement rules and failed to justify the *de facto* preemption of those state rules.

In summary, because of these substantive and procedural defects, the FCC should reconsider and rescind the *Report and Order* and provide sufficient advance notice and opportunity to comment on the proposed final rules, before proceeding to adopt final rules.

II. THE FCC FAILED TO PROVIDE SUFFICIENT ADVANCE NOTICE AND OPPORTUNITY TO COMMENT ON THE PROPOSED FINAL BIDDING PORTAL RULES.

The FCC initiated the *Bidding Portal NPRM* in response to the FCC's Office of Inspector General (OIG) recommendation from 2017, and a General Accounting Office (GAO) report

[3] *Promoting Fair and Open Competitive Bidding in the E-Rate Program*, WC Docket No. 21-455, Notice of Proposed Rulemaking, 36 FCC Rcd 17892 (2021) (*Bidding Portal NPRM*).

published in September 2020. Both the OIG and GAO specified the purpose of the portal would be a repository for the submission of service provider bids. The Commission described OIG's request as:

> [T]he Commission's Office of Inspector General (OIG) has recommended safeguards to protect the E-Rate program, including establishing a central repository for the submission of competitive bidding documents and a holding period, so that bids are not released to applicants until after the closing of a 28-day bidding window." [4]

The Commission described GAO's position as:

> Noting the OIG's recommendation for a bidding repository, the GAO concurred that a portal "*could* strengthen program controls by allowing USAC direct access to obtain and monitor bidding information submitted by bidders without having to request such information from the applicants or service providers." [5]

The *Report and Order* adopted a significantly different framework that converted the repository to a mandatory competitive bidding portal that required the real time submission of all communications. For example, while the *Bidding Portal NPRM* proposed rules for the submission of bids and pre-bid communications, the *Report and Order* prescribed that the portal must be used for all communications up until the time that a contract is awarded or the contract award date. The FCC stated:

> We clarify that bidders and applicants will use the portal for communications regarding the requested services and products beginning on the date the applicant files the FCC Form 470 until the contract is awarded, or the contract award date, with limited exceptions described below.[6]

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[4] *Bidding Portal NPRM*, para. 2; Federal Communications Commission, Office of Inspector General, Semiannual Report to Congress, October 1, 2016 – March 31, 2017 (Washington, D.C.: May 2017)(*OIG 2017 Report)*

[5] *Bidding Portal NPRM,* para. 9; GAO, Telecommunications: FCC Should Take Action to Better Manage Persistent Fraud Risks in the E-rate Program, GAO-20-606, 19 (Sept. 16, 2020) (2020 GAO Report) (emphasis added).

[6] *Report and Order*, para. 27.

This significant change was not a logical outgrowth of the *Bidding Portal NPRM.* The United States Court of Appeals for the D. C. Circuit described what is meant by "logical outgrowth" and when additional notice and comment is required:

> After publishing notice in the Federal Register of "the terms or substance of the proposed rule or a description of the subjects and issues involved," the agency "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C § 553(b), (c). For notice to be sufficient, the final rule must be "a logical outgrowth" of the proposed rule in the sense that the original notice must "adequately frame the subjects for discussion." Omnipoint Corp. v. FCC, 78 F.3d 620, 631, 316 U.S. App. D.C. 259 (D.C. Cir. 1996). Put otherwise, "the affected party 'should have anticipated' the agency's final course in light of the initial notice." Covad Commc'ns Co. v. FCC, 450 F.3d 528, 548, 371 U.S. App. D.C. 283 (D.C. Cir. 2006). A reviewing court is to take "due account . . . of the rule of prejudicial error."[7]

In the National Lifeline Association appeal decision cited above, the Court found that substantive changes to the final Lifeline program rules were outside the scope of the proceeding, since they had not been contemplated in the underlying notice of proposed rulemaking. The Court stated:

> When substantial rule changes are proposed, a 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment. Petry v. Block, 737 F.2d 1193, 1201, 238 U.S. App. D.C. 46 (D.C. Cir. 1984); see Prometheus Radio Project v. FCC, 652 F.3d 431, 453 (3d Cir. 2011).[8]

The same conclusion should be reached in this proceeding. The draft *Report and Order* was posted only on the FCC's website on the Commission's April 2026 Open Meeting web page; and, there was only two weeks for interested parties to file comments prior to the Commission meeting.[9]

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[7] Nat'l Lifeline Ass'n v. FCC, 921 F.3d 1102, 1115-1116 (D.C. Cir. 2019).
[8] *Id.* at 1117.
[9] While regular participants in FCC proceedings such as SHLB located the draft *Report and Order,* and are familiar with the FCC's *ex parte* rules, there is no way to know how many other

The FCC should rescind the *Report and Order* and abide by the requirements of the Administrative Procedure Act to publish legal notice of the document in the Federal Register and establish at a *minimum,* 30 days for comments and 60 days for replies to comments. Preferably there should be 60 days for initial comments and 90 days for reply comments.

III. THE FCC RELIED ON OUTDATED INFORMATION AND SHOULD HAVE SOLICITED UPDATED COMMENTS TO ENSURE THAT THE REPORT AND ORDER WAS BASED ON ACCURATE EVIDENCE.

In the four years since the issuance of the *Bidding Portal NPRM*, the enforcement measures and program controls to enhance program integrity and detect and prevent fraud in the E-Rate program have continued to expand. The current regulatory landscape of the program is significantly different from 2021 and 2022, when the *Bidding Portal NPRM* was issued and comments were submitted. Both the FCC and GAO have now stated in subsequent formal communications that the E-Rate program has achieved the implementation of effective controls to ensure compliance with program rules and detection of waste, fraud and abuse. Yet, the *Report and Order* is devoid of any consideration of these updates. SHLB tried to refresh the record in the limited time available for preparing its *ex parte* filings, but the Commission nevertheless did not address the merits of this updated information in its *Report and Order*.

First, the concerns in the 2020 GAO Report have been satisfied by the adoption of anti-fraud measures implemented after the issuance of the *Bidding Portal NPRM*. The 2020 report can no longer be used to justify the bidding portal. GAO's recent study, in December 2025, analyzing fraud prevention protections in five different federal programs, found that E-Rate was the only program that has adopted all nine of GAO's anti-fraud requirements and best

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interested stakeholders were not aware of the draft *Report and Order* and the associated option to file comments.

practices.[10] Additional proof that GAO's concerns have been met can be found on the agency's website, which indicates that all three recommendations from its 2020 report have been implemented by the FCC.[11] [12]

Second, the *Report and Order* fails to consider that the E-Rate improper payments rate in 2024 is below the statutory standard of 1.5%.[13] This percentage is based on USAC's payment quality assurance reviews that verify, *inter alia*, that disbursements were made in compliance with all program requirements – including competitive bidding.[14] The decline in the improper payments rate also has occurred in the years following the release of the *Bidding Portal NPRM.* This is another indication that adequate measures are in place to detect and weed out waste, fraud and abuse in the E-Rate program without the need for a bidding portal.

Third, the Commission asserts that "recent OIG and DOJ criminal investigations into the program" provide evidence that "fraud remains a problem." The majority of cases cited by the Commission, however, are not recent; six of the seven mentioned cases of fraud all occurred nearly a decade or more ago. The one recent case was a prosecution of wrongdoing in the Emergency Connectivity Fund (ECF) program, concerning kickbacks from equipment suppliers. The pre-existing E-Rate competitive bidding rules, which already work effectively to prevent

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[10] Report to Congressional Requesters, GAO-26-107444 (pub. Dec. 4, 2025, rel. Jan. 5, 2025), *available at* https://www.gao.gov/products/gao-26-107444 (2025 GAO Report).
[11] https://www.gao.gov/products/gao-20-606.
[12] Notably, GAO's three recommendations did *not* include the establishment of the bidding portal. In its 2020 Report, GAO acknowledged OIG's request for the portal and made the equivocal and rather non-committal statement that the bidding portal "could" strengthen program controls. But that was the extent of GAO's comments about the portal.
[13] Letter from Mark Stephens, Managing Director, FCC to Fara Damelin, Inspector General, FCC, re. Inspector General's Top Management and Performance Challenges for FY 2025 for the Federal Communications Commission (Oct. 29, 2024).
[14] https://www.usac.org/about/appeals-audits/pqa-program/
https://www.usac.org/wp-content/uploads/e-rate/documents/SL-Documents.pdf

waste, fraud, and abuse in the E-Rate program, did not apply in the ECF program; and therefore, this prosecution is not evidence of competitive bidding fraud in the E-Rate program.

The Commission is incorrect in citing these cases to claim that fraud "remains" a problem in the E-Rate program, and that they justify the overly burdensome bidding portal process.

The FCC should have invited parties to file comments to update the record evidence and to describe current circumstances regarding the E-Rate program's controls and should have considered this information in lieu of relying on outdated and inaccurate information to enact new rules.

By failing to consider whether the bidding portal is a necessary measure in light of the current circumstances of the E-Rate program's fraud prevention measures, the FCC's decision-making process was arbitrary and capricious, and arrived at an unreasonable result.

IV. THE FCC FAILED TO PROVIDE LEGAL JUSTIFICATION FOR ITS AUTHORITY TO MANDATE THE ESTABLISHMENT OF A NATIONWIDE MANDATORY BIDDING PORTAL THAT CONFLICTS WITH STATE PROCUREMENT REQUIREMENTS.

The *Report and Order* also erred by exceeding the FCC's authority to mandate a national competitive bidding portal that is inconsistent with state laws and regulations governing E-Rate procurements. The bidding portal will have the effect of preempting these existing rules and laws regardless of the FCC's claim that the portal will not supplant these rules and laws, and must be used alongside these requirements.[15] It will be impossible for these frameworks to operate simultaneously, and the concerns raised by the 21 commenting parties, including nine state agencies, as to how the bidding portal will conflict with state law, cannot be dismissed, as the *Report and Order* attempted to do.

[15] *Report and Order,* para. 25.

The most evident example is Mississippi's state procurement law which prohibits compelling a bidder to submit bids electronically.[16] The FCC's response, that the E-Rate portal does not conflict with this statute, ignores the reality that an E-Rate procurement conducted by a Mississippi applicant requires the submission of an electronic bid to be eligible for an E-Rate contract award. Consequently, the state must disregard its own statute and require electronic bids to be uploaded to the E-Rate portal. This amounts to an actual, not perceived or possible, conflict between the state law and the E-Rate bidding portal regulations.

There is no preemption authority conferred to the FCC in any of the universal service provisions in Section 254. Further, preemption of state and local procurement laws and regulations is outside the scope of the FCC's authority to regulate communications. The FCC failed to justify overriding and preempting existing state procurement laws and regulations, and, therefore, the *Report and Order* should be rescinded.

V. THE COMMISSION'S COST ANALYSIS FOR THE BIDDING PORTAL IS UNSUBSTANTIATED AND BASED ON INCORRECT ANALYSIS.

The Commission recognized in the *Report and Order* that "commenters raise concerns regarding the potential costs associated with creating, implementing and managing the competitive bidding portal."[17] The Commission's cost analysis response consisted of a single sentence: "To address the cost concerns, we estimate that the cost of creating, implementing, and managing the competitive bidding portal for the first year of operation will be under $750,000, followed thereafter by annual operating costs of $100,000 to $200,000, which together represents

[16] *Id.* at para. 26; Miss. Code Ann. § 31-7-13(c)(v).
[17] *Report and Order*, para. 22.

a comparatively low cost to take measures to protect a program where the funding cap in funding year 2026 is $5.2 billion.[18]

The only support the Commission provided for this sentence was a citation to the E-Rate program funding cap. No information was provided to support the cost estimates for the portal. The Commission did not explain how much was attributed to creating the necessary system changes; whether and how much was allocated for storage of the hundreds of thousands of documents required to be uploaded and maintained for 10 years; what costs were included for additional staff or outside consultants needed to operate and oversee the bidding portal; and whether costs associated with additional training for staff and E-Rate participants were taken into account. The estimates are unsubstantiated and are arbitrary and capricious.

The Commission attempts to justify its arbitrary cost estimates by stating, "These costs are also markedly lower than the millions of dollars in E-Rate funding that have been recovered as a result of OIG and DOJ investigations of competitive bidding violations."[19] As discussed above, the E-Rate recovery cases cited by the Commission all occurred nearly a decade or more ago. Based on the Commission's provided information, therefore, the amount of E-Rate funding recovered through recent investigations is $0, which is significantly less than the unsupported $950,000 cost estimate provided by the Commission. The Commission's assertion that the bidding portal costs are justified is simply factually inaccurate.

[18] *Id.*
[19] *Id.*

VI. CONCLUSION

The Schools, Health & Libraries Broadband Coalition requests the FCC to rescind its *Report and Order* and establish a supplemental comment cycle with a minimum of 60 days for initial comments and 90 days for replies to comments. Thereafter, the *Report and Order* should be revised consistent with the current facts and circumstances governing the E-Rate program.

Respectfully submitted,

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