

Inside the FCC's First Enforcement Action For Violation of the E-rate Program's Lowest Corresponding Price Requirement

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Late last month, the Federal Communications Commission ("FCC" or "Commission") released its first enforcement action predicated on the "Lowest Corresponding Price" requirement of its E-rate rules. The LCP rules require a telecommunications carrier to offer schools and libraries communications services "at rates lower than that charged for similar services to other parties." The Commission's [Notice of Apparent Liability](#) ("NAL") proposes to fine Bellsouth (d/b/a AT&T Southeast) slightly more than \$100,000 for violations of this requirement. Surprisingly, this is the first FCC proposed fine for a violation of the "Lowest Corresponding Price" requirement, despite it being a requirement under the program since its inception nearly twenty years ago. In this post, we take a look inside the order, with an eye toward what the FCC's approach means for other E-rate service providers.

On July 27, 2016, the Enforcement Bureau released a Notice of Apparent Liability to BellSouth Telecommunications (dba AT&T Southeast) for violations of the "Lowest Corresponding Price" requirement of the FCC's E-rate rules. The Commission found that AT&T had failed to offer the lowest price to two school districts in Florida: Orange County Public Schools (near Orlando, FL) and Dixie County School District (west of Gainesville, FL). The FCC alleges that these two school districts were charged high "month to month" rates for two common business services – Primary Rate Interface ISDN services (referred to as "PRI" service in the NAL) and flat-rated business multiline local service – rates that were sometimes 400% to 500% higher than the lowest rate available to other customers. The Commission proposes a fine of \$106,425 and seeks recovery of \$63,370 in previously paid E-rate support for the violations.

As background, the LCP rule requires E-rate service providers to offer schools and libraries services "at rates less than the amounts charged for similar services to other parties." The FCC explained that this rule requires that the schools or libraries receive the lowest price for "similar services" offered to non-residential business subscribers, and that the service provider must affirmatively offer

this rate (that is, the school need not request it or negotiate it). In describing the “similar services” test, the Commission stated that it would not be permissible for a service provider to argue that there are no similarly-situated non-residential customers. Other than this explanation of the standard, there has been (until now) little guidance on how to apply the rule to E-rate services.

As stated, in this instance, the NAL alleges that AT&T failed to offer the LCP to these two school districts for a period of years. AT&T provided service to these school districts from July 2012 through June 2015, and the FCC found that AT&T violated the LCP rule over these three years. As we shall discuss in a moment, however, the FCC limited its fine to services provided in the last E-rate year – July 2014 to June 2015.

First, the FCC’s forfeiture calculation methodology is similar to that which it used in other Universal Service contexts. The Commission proposes a base forfeiture of \$20,000 for each inaccurate FCC Form 472 and Form 473 filed, plus a “treble damages” factor based on the amounts overpaid to AT&T. Because the FCC chose to limit its fine to only the last E-rate year in which charges were made, the overall fine is relatively modest (at least by today’s Enforcement Bureau standards). Specifically, the FCC proposes a fine of \$60,000 for three forms filed within the 2014-15 time period, plus an upward adjustment amount of \$46,425, representing three times the \$15,475 overcharged during that same time period. Further, the Commission proposes restitution to the Fund in the amount of \$63,760 for overcharges during the entire three year period (taking the position not only that reimbursement can be ordered by the Commission but also that the 1-year statute of limitations does not apply to recovery of USF support paid). This is also a first for the FCC, to seek full recovery, which cites to its 2004 Schools and Libraries Fifth Report and Order as the authority to recover in full amounts overpaid by USAC.

Commissioners Pai and O’Rielly dissented from the NAL, but only Commissioner Pai offered a statement explaining the dissent. In his dissent, Commissioner Pai criticized the NAL for being beyond the 1-year statute of limitation. He repeated his long-standing rejection of the “continuing violation” theory applied to Universal Service forms (which holds that an erroneous form is a violation until the form is corrected). Absent the continuing violation theory, Pai asserted, the violations last occurred, at the latest, on June 1, 2015 – 56 days beyond the FCC’s statute of limitations for an order issued in late July 2016.

Lastly, following a recent trend, the NAL also directs AT&T to file a report thirty days after the NAL’s release providing certain information about its E-rate practices and its intended changes to those practices. Specifically, the Commission ordered AT&T to provide a report to the FCC within 30 days. The report must identify all non-residential customers who were “similarly situated” to the school districts, describe how AT&T intends to update an internal procedure [the details of which were redacted] to ensure that sales agents offer only LCP-compliant prices, and how it intends to identify the similarly situated customers for any given school or library customer. This report must be accompanied by “detailed factual statements” with “appropriate documentation” and affidavits to support the report. The notion that AT&T, in essence, should demonstrate how it is going to “fix” a violation proposed in the NAL, despite AT&T’s challenge to that finding, is similar to an instruction contained in the Data Throttling [NAL](#) issued last June, which sparked a vigorous dissent by Commissioner O’Rielly at the time.

Turning to the LCP analysis itself, the NAL offers insight into the Commission’s view of the LCP requirement. First, the FCC limited the analysis to customers in the same state (although it warned that it could compare across states in future orders). Second, the FCC compared the rates AT&T charged to several alternatives available to E-rate subscribers. Finally, the FCC compared the rates

AT&T charged to rates it charged business customers in the state.

It is difficult to follow the FCC's analysis completely due to the heavy redactions of AT&T rates and pricing strategies that appear in the public version of the NAL. (And, in any event, AT&T apparently challenges the factual conclusions drawn.) Nevertheless, what is instructive for other providers is the FCC's general approach. Notably, when comparing AT&T rates to those available to other E-rate subscribers, the FCC had two principal criticisms: (1) AT&T did not give the customers the 1-year term plan rates, even though it found that the school districts implicitly requested a 1-year term, and (2) AT&T did not offer rates that the schools qualified for under a state-wide contract, even though the schools did not purchase under that contract and were not billed under that contract. The lesson seems to be that E-rate service providers should "shop around" for favorable rates that the schools may qualify for.

More broadly, the FCC appeared to suggest that AT&T violated the rules because its policies did not examine corresponding prices (or did not do so adequately). That is, separate and apart from the actual price that was charged, the FCC suggested that AT&T failed to show that it had analyzed corresponding prices at the time it was offering service to the school districts. In a warning to the industry as a whole, the NAL asserts, "compliance with the LCP Requirement necessarily requires an **ongoing, real-time process** that evaluates the rates offered and charged for services provided to (or requested by) E-rate applicants with the rates to other similarly situated customers" (emphasis added). AT&T's process failures, as much as its outcome, seemed to trouble the Commission.

The specific facts relating to AT&T's charges will take some time to play out. In the meantime, E-rate service providers should examine their own pricing practices in light of the FCC's approach above. Service providers should ensure that they have a process in place to review comparable prices at the time of the bids, and also that they have access to data showing comparable rates in order to demonstrate compliance with the LCP rule. While this is the first enforcement action under that rule, it surely will not be the last.