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## Funding Status for E-Rate and ECF

### *E-Rate for FY 2023:*

USAC issued Wave 47 for FY 2023 on Thursday, March 14<sup>th</sup>, for \$6.43 million, none for North Carolina. Total funding is now \$2.60 billion including \$84.7 million for North Carolina. At this point, USAC has funded 97.9% of the originally submitted applications representing 93.7% of the dollars requested.

### *ECF for 2021-2023:*

Total commitments for all three ECF windows are \$6.47 billion including \$192 million for North Carolina.

### *E-Rate for FY 2024:*

The Form 471 filing window for FY 2024 closes next week on Wednesday, March 27<sup>th</sup>, at 11:59 p.m. EDT. As of last weekend, USAC had received 18,575 certified applications for FY 2024 requesting \$1.16 billion. Those reviewed and marked “Wave Ready” are expected to be included in the first funding wave for FY 2024 in late April.

## Black Hole Litigation

Applicants, service providers, and consultants who have been involved in E-rate for any period of time, have likely experienced the frustration of waiting for USAC decisions, with no indications of why one or more applications are on hold. The worst of such situations, often referred to as

“black holes,” arise when USAC appears to be investigating possible competitive bidding or other E-rate violations. Getting any information from USAC in these situations is typically difficult, if not impossible. Sometimes it is possible to guess at a potential problem based on USAC inquiries; other times USAC is simply uncommunicative. Decisions may be withheld for years. In the meantime, applicants do not get funded and suppliers do not get paid, often for equipment and services that have already been provided. Appealing to USAC or the FCC for decisions that have not been made, while perhaps technically possible, has never worked.

Last month, two suppliers — Essential Network Technologies (MO) and MetComm.Net (NY) — took a different approach by filing a joint [petition](#) (and an [addendum](#)) with the D.C. Circuit Court of Appeals asking the Court to order the FCC and/or USAC to issue funding decisions on recent and longstanding applications.<sup>1</sup> By our count, shown in the table below, almost one hundred of the funding requests involving these suppliers that have been filed in the last five funding years are still pending.

Funding Year	Essential Network Technologies FRNs				Metcomm.Net FRNs					
	Requested	Funded	Denied	Pending	Requested	Funded	Denied	Pending		
2023	20	16	0	4	30	0	0	30		
2022	27	16	1	10	29	17	1	11		
2021	35	23	1	11	34	12	9	13		
2020	64	58	0	6	30	20	3	7		
2019	28	25	2	1	27	23	1	3		
	Total Pending				32	Total Pending				64

In addition to pending applications, USAC has notified the suppliers that it is investigating funding as far back as FY 2011 that could lead to the reduction, denial, or rescission of other funding. From what can be determined, in part through reviewing PIA inquiries, USAC appears to be concerned with competitive bidding issues including possible assistance in preparing Form 470s. Without decisions, of course, neither the suppliers nor their customers can formally appeal USAC’s apparent allegations.

In their petition, the suppliers ask the Court to intervene. Arguing that the FCC rules do not place a clear and reasonable time limit on USAC’s deliberations, the suppliers urge the Court to review how the FCC and USAC are applying the E-rate rules to their situations or, in the alternative, to issue a writ of mandamus<sup>2</sup> directing the FCC to “promptly issue funds” and render a written decision within 90 days.

The FCC’s [response](#) appears a bit circular. The FCC argues that the Court has no jurisdiction to consider the suppliers’ petition for review, since there is no final decision for the Court to review, and that, in any case, it is appropriate for USAC to withhold funding while investigating potential rule violations. The suppliers, in turn, [argue](#) that the FCC’s position that there is no decision to review “ignore that the very *lack* of a decision despite years having gone by is precisely why

<sup>1</sup> We thank Deborah Krabbendam of Clark Hill, Philadelphia, for bringing this litigation to our attention.

<sup>2</sup> A “writ of mandamus” is a judicial remedy in the English and American common law system consisting of a court order that commands a government official or entity to perform an act that it is legally required to perform as a part of its official duties.

Petitioners are seeking relief from this Court,” and that they have, at a minimum, asserted a “substantial challenge” to the process. They note that the FCC does “not devote a single word attempting to refute Petitioners’ showing that delayed adjudication ‘will cause irreparable injury,’ which is the key element supporting expedited consideration of this matter.”

While we cannot predict whether the Court will grant the FCC’s motion to dismiss the petition, our hope is that the Court will allow the case to proceed and that the FCC will ultimately be ordered, or at least motivated, to adopt fair and effective procedures for the timely resolution of otherwise unresolved investigations. For too long, black holes have been a black mark on the E-rate program.

Sidenote. One interesting aspect of this case, as reflected in email correspondence attached to the suppliers’ Court filings, are USAC’s questions and MetComm’s responses regarding the ongoing investigations. Most importantly, USAC is focusing on Form 470s submitted via MetComm’s own IP addresses. Such IP-identified Form 470s have long been considered by USAC as demonstrating a supplier’s potentially improper involvement in the competitive bidding process. Helping to file an applicant’s Form 470 means that the supplier had advanced knowledge of the applicant’s request for bids and may have even helped define the services requested. In response to these Form 470 filing questions, MetComm:

- Admitted to one specific instance when its staff submitted an existing customer’s Form 470 when that customer’s E-rate contact was physically unable to certify the form on time.
- Said it routinely sent correspondence to school leaders, existing clients or not, providing a list of suggested resources (including links to USAC information) for filing a Form 470. For existing customers, needing to rebid, MetComm offered to “provide you with a list of services you are currently receiving, in a format easy to follow when filing your Form 470. We may also provide recommendations for upgrades/downgrades.” Although USAC has never provided any guidance as to what pre-procurement information can be provided by an incumbent supplier, we can understand why such an offer might raise a USAC eyebrow or two.
- Most interestingly, with respect to the same IP issue, MetComm noted that, as an internet service provider, it has historically operated proxy servers within its network to provide caching and/or content filtering services for its customers. By doing so, internet traffic originated by MetComm’s customers, including the filing of Form 470s, would appear to come from a limited set of MetComm’s own IP addresses.<sup>3</sup>

We take no position on any actions taken or not taken by Essential Network Technologies and MetComm.Net as E-rate providers, nor do we question the important role assigned to USAC to investigate any potential violations of E-rate rules. We are concerned, however, when such investigations become interminable. We urge USAC, the FCC, and now the Courts, to establish procedures and timetables to eliminate E-rate black holes.

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<sup>3</sup> Note that, as has become more common with many people working from home, Form 470s filed from an individual’s own internet account may bear the IP address of the filer’s individual internet provider.

## Updates and Reminders

### *Upcoming Dates:*

March 22	Form 486 deadline for FY 2023 Wave 31. More generally, the Form 486 deadline is 120 days from the FCDL date or from the service start date (typically July 1 <sup>st</sup> ), whichever is later. Upcoming Form 486 deadlines are: Wave 32 03/29/2024 Wave 33 04/05/2024 Wave 34 04/12/2024
March 27	Close of the Form 471 application window for FY 2024. To be considered as “In Window,” Form 471s must be filed and certified by 11:59 p.m. EDT.
April 18	USAC webinar on Program Integrity Assurance (“PIA”) and Selective Reviews ( <a href="#">registration</a> ).
August 29	Invoice deadline for ECF Window 3 applications.

### *February 27<sup>th</sup> Invoice Corrections – Part 2:*

After generating a second set of invoices to replace the first set of invoices filed on February 27<sup>th</sup>, erroneously denied for FY 2022 recurring services (see our [newsletter of March 11<sup>th</sup>](#)), USAC apparently found errors in its own replacement invoices. With no initial explanation, USAC then sent out “Notice of Improperly Rejected Invoice” notices on March 4<sup>th</sup> for the replacement invoices. USAC subsequently clarified that a third set of invoices (USAC’s second set) was being prepared and that filers would be notified of the new invoice numbers. Again, the new invoices would reflect the initial invoice nicknames to applicants and service providers so they could align the new invoice numbers with their original invoices. Hopefully, the third time is a charm.

### *Inflation-Adjusted Funding Caps for FY 2024:*

As it does every year, and as a pre-condition for the release of funding decisions for the new funding year, the FCC issued a [Public Notice](#) announcing the inflation-adjusted funding cap — up 3.6% — for FY 2024. The adjustment brings the overall cap to \$4,940,076,139.

What is more interesting, however, is that the total E-rate funding cap is comprised of separate sub-caps for Category 1 and Category 2 services initially established in the FCC’s first Modernization Order. Most importantly, the Category 2 cap, initially set at \$1 billion (see [FCC 14-99, ¶ 118](#)), will, with the intervening years of inflation adjustments, be only \$1.235 billion for FY 2024. Actual Category 2 demand, as governed by the existing Eligible Services List, is already pushing the boundary of its annual cap. As of this week’s Wave 47, Category 2 commitments for FY 2023 total \$1.121 billion, only \$71 million below the current FY 2023 cap.

Limited funding under the current Category 2 cap may explain why the FCC chose to establish the Cybersecurity Pilot as a separate USF program outside of the E-rate program. It also suggests why the FCC may ignore the many requests in the cybersecurity comments to immediately expand the Eligible Services List to include advanced firewalls and/or to increase Category 2 budgets. To do

either or both would require the FCC to increase the proportion of E-rate funds (currently 25%) set aside for Category 2.

By contrast, there is currently more than enough funding available for Category 1. For FY 2023, the Category 1 cap is \$3.576 billion, well above current Category 1 commitments of \$1.477 billion. Some of the excess Category 1 funding will be used to fund school bus Wi-Fi beginning in FY 2024 and hotspots most likely in FY 2025.

### *FCC Adopts Cybersecurity Device Labeling Program:*

As expected, the FCC [adopted](#) a voluntary labeling program under which wireless consumer devices — so-called Internet of Things (“IoT”) products — will be qualified to carry a new “[U.S. Cyber Trust Mark](#)” logo if they meet the program’s higher cybersecurity standards. Printed labels, bearing the Cyber Trust Mark, will be affixed to device packaging visible at the point of purchase, accompanied by QR codes that may be scanned for additional security details. Examples of products that may carry the new labels include home security cameras, voice-activated shopping devices, internet-connected appliances, fitness trackers, garage door openers, and baby monitors.

The new program, for which device manufacturers’ participation is voluntary, will rely on public-private collaboration, with the FCC providing oversight and approved third-party label administrators managing activities such as evaluating product applications, authorizing the use of the label, and consumer education. Compliance testing will be handled by accredited labs.

Although printed labels may prove beneficial to consumers shopping for safer wireless products, we were disappointed that the FCC’s final Report and Order (see [draft](#)) made no reference to the [comments](#) filed by E-Rate Central and two technology associations to consider expanding the program to include an electronic label that could be “read” by the systems to which such devices seek to be connected (see our [newsletter of November 6, 2023](#)).

### *Universal Service Monitoring Report:*

The FCC issued its annual [Universal Service Monitoring Report](#) for 2023 last week. The report contains summary data on the Universal Service Fund. Data on the E-rate program includes annual commitments and disbursements for funding years 1998-2022 by applicant type (Table 4.1 on Page 50) and total commitments and disbursements by state and applicant type as of June 30, 2023 (Table 4.2 on Page 52).

## **USAC E-Rate News Brief Dated March 13 – Last-Minute Form 471 Tips**

[USAC’s E-Rate News Brief dated March 13, 2024](#), provides reminders and tips related to the FY 2024 application window including the following:

- The interim SPIN, 143666666, became available last week for use by applicants who cannot immediately identify the Service Provider Identification Numbers of the service providers listed in their Form 471s.

- USAC’s Customer Service Center (“CSC”) will be open for extended hours in the last days of the application window.
  - 12 p.m. to 5 p.m. EDT during the March 23-24 weekend.
  - 8 a.m. to 8 p.m. EDT on March 25-26.
  - 8 a.m. to 11:59 p.m. EDT on March 27, the final day of the window.
- Last-minute filing tips are included regarding:
  - Using “SAVE & CONTINUE,” rather than “SAVE AND SHARE,” when temporarily exiting EPC when working on an incomplete Form 471.
  - Certifying the Form 471.
  - Correcting information on a Form 471 after it is certified.
  - Planning for advanced installation of non-recurring services.
- What to do if you missed the February 28<sup>th</sup> deadline for filing a Form 470.
- E-rate program document retention requirements.

The News Brief also highlights in-person training opportunities in 2024, tentatively including four one-day workshops — up from one in 2023 — in:

- Dallas, Texas (September 17);
- Washington, DC (October 7);
- Fayetteville, Arkansas (October 29); and
- A special Tribal-focused session in Palm Springs, California (November 12).

Also new this year, USAC will be attending selected industry conferences (one last week and eight more currently scheduled) with booths staffed to answer individual applicant and supplier questions. A schedule of all workshops and conferences is available in the [In-Person E-Rate Training Events](#) section on USAC’s website.

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*Additional North Carolina specific E-rate information is available through our Web site — <http://www.e-ratecentral.com/us/stateInformation.asp?state=NC>. Note that this site provides easy access to formatted North Carolina applicant E-rate histories via the Billed Entity Number (“BEN”) search mechanism in the upper left-hand corner. Detailed information can be obtained by “drilling down” using the links for specific funding years and individual FRNs.*

*If you have received this newsletter from a colleague and you would like to receive your own copy of the North Carolina E-Rate Forum, send an email to [join-ncerate@lists.dpi.state.nc.us](mailto:join-ncerate@lists.dpi.state.nc.us). Please include your name, organization, telephone, and e-mail address.*

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