DOCKET FILE COPY ORIGINAL

KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP
1200 19TH STREET, N.W.
SUITE 500
WASHINGTON, D.C. 20036
(202) 955-9600

NEW YORK, NY
TYSONS CORNER, VA
LOS ANGELES, CA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM
HONG KONG

AFFILIATE OFFICES
BANGKOK, THAILAND
JAKARTA, INDONESIA
MANILA, THE PHILIPPINES
MUMBAI, INDIA
TOKYO, JAPAN

FACSIMILE
(202) 955-9792
www.kelleydrye.com

DIRECT LINE (703) 918-2320
E-MAIL: jgriffin@kelleydrye.com

April 5, 2002

RECEIVED
APR 05 2002
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

William F. Caton
Secretary
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554
Attn: Claudia Fox, International Bureau

Re: XO Communications, Inc.
Applications for Consent to Transfer of Control
IB Docket No. 02-50

Dear Mr. Caton:

XO Communications, Inc. ("XO"), by its attorneys, hereby requests that the Commission extend the due date for comments and petitions in the docket captioned above until April 22, 2002, and the due date for responses and oppositions in this docket until May 6, 2002. Comments and petitions are currently due on April 10, 2002, while responses and oppositions are due on April 24, 2002.[1] XO asks for this extension because of the continuing uncertainty about the details of its corporate restructuring.

[1] *See* "Commission Seeks Comment on Applications For Consent to Transfer Control Filed by XO Communications, Inc.," DA 02-579, rel. Mar. 11, 2002; Erratum, rel. Mar. 12, 2002.

No. of Copies rec'd 1
List ABCDE

Please contact the undersigned counsel if you have any questions regarding this matter.

XO COMMUNICATIONS, INC.

By: _____

Brad E. Mutschelknaus
Joan M. Griffin
M. Nicole Oden
Its Attorneys

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

RECEIVED

APR 05 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Schools and Libraries Universal Service Support Mechanism	)	CC Docket No. 02-6
	)	
	)	

COMMENTS OF THE
SOFTWARE & INFORMATION INDUSTRY ASSOCIATION

April 5, 2002

On behalf of the Software & Information Industry Association (SIIA), I write to submit our response to the February 19 Federal Register Notice of Proposed Rule Making (NPRM) soliciting comments on the Schools and Libraries Universal Service Support Mechanism. This support mechanism (E-Rate) has been critical to the efforts of eligible elementary and secondary schools and libraries to access the telecommunications, Internet and related technologies so important to their educational mission. SIIA and its member companies look forward to working with the Federal Communications Commission, its Universal Service Administrative Company (USAC) and Schools and Libraries Division (SLD), and other stakeholders to make reforms and improvements that continue and enhance the E-Rate to better meet its Congressional intent and vital purpose.

SIIA is the principal trade association of the software code and digital content industries, representing more than 800 leading high-tech companies that develop and market software and electronic content for business, education, consumers and the Internet. SIIA member companies partner with schools and libraries to provide education software tools, digital curriculum and related technology products and services. SIIA members also depend on the nation's schools for a skilled high-tech workforce, and view technology as critical to meeting the nation's education and workforce goals.

We have been generally pleased with the administration, implementation and impact of the E-Rate. Continued federal leadership through the E-Rate is an essential element of the nation's effort to effectively integrate technology into instructional and management practices. Based on our experience and that of our members in both helping to develop the legislation and our practical experience working with stakeholders to implement education technology solutions, we take this opportunity to respond to the notice of proposed rulemaking and comment on the rules governing the schools and libraries universal support mechanism. We provide these views with the goal of enhancing the E-Rate to better meet both the law's intent and the nation's education technology needs.

No. of Copies rec'd 0
List ABCDE

I. Application Process

A. Specific List of Eligible Products and Services

SIIA supports a balance in the E-Rate that ensures it keeps pace with evolving technologies and technology delivery models, provides for a simplified application and administrative process, and is only used for eligible services that meet the law's intent. To that end, SIIA urges that the Eligible Services List be maintained in a form and level of granularity similar to that currently in place. The appropriate expansion of the scope of eligible services to reflect evolving technologies should not be accompanied by inclusion of a more detailed list of pre-approved products and services that would presumably include such items as company name, item name or other specific brand or product identification. While this detailed list could help simplify the process, it would ultimately serve to limit applicant's choices and create more complication.

The list of specific technology products and services continues to evolve rapidly, and SIIA is concerned that even a well-resourced USAC could not adequately keep pace with this change. Failure to include all specific products and services that meet the eligible categories from all vendors would violate the goal of competitive neutrality by discouraging applicants from taking advantage of those not listed, including many that are new, not yet widely available or being beta-tested through public-private partnerships.

As an alternative, SIIA recommends that the current Eligible Services List be expanded as appropriate to include more specific descriptions, especially with regard to services with "conditional" eligibility.

B. Expanded List of Eligible Products and Services

As noted above, SIIA supports the goal of ensuring the list of eligible E-Rate products and services is updated and expanded to reflect new technologies as well as related purchasing and implementation models. USAC has worked closely with educators and providers to ensure the list of eligible products and services is updated in this way, and SIIA encourages continued examination of and changes to this list.

Section 254 provides for discounts for services for "educational purposes." To that end, SIIA urges that "educational purposes" be interpreted broadly to include those eligible services that, while not directly used to provide instruction and learning, are necessary to create the safe, secure and efficient educational setting conducive to that teaching and learning. Technology products and services are increasingly designed to serve both direct and indirect educational purposes in an integrated manner. As such, it is often inefficient and shortsighted to separate out direct "educational purposes" from those that indirectly support teaching and learning. Examples include technologies that support parental involvement and teacher networks, as well as student information management systems that include both academic and non-academic information.

SIIA also urges that resources be dedicated to ensure the list of eligible products and services is updated in the timely manner necessary to encourage technology innovation. Excessive delays penalize both applicants seeking to integrate new solutions and models, as well as providers working to better meet the demands of applicants.

With regard to the treatment of bundled content, SIIA recommends continuation of current policies that provide discounts only for the eligible services component of the bundled service. More favorable treatment for bundled content would likely create inappropriate incentives for providers and applicants, violate the goals of competitive neutrality by providing favor to certain business/delivery models over others, and ultimately dilute limited resources away from priority services.

C. Compliance with the Americans with Disabilities Act

SIIA and its member companies support the goal of ensuring individuals with disabilities have access to telecommunications, Internet and related technologies and produce a variety of products and services to achieve this goal. However, SIIA does not view it as appropriate for the E-Rate program to legally or practically enforce compliance with the Americans with Disabilities Act (ADA), Individuals with Disabilities Act (IDEA) or the Rehabilitation Act of 1973. We therefore urge the FCC ***not to amend or supplement*** the existing FCC Form 471 notice with an explicit certification requirement regarding accessibility with more explicit certification requirements.

First, nothing in the authorizing legislation for the E-Rate supports the FCC requiring certification requirements described in the NPRM. In fact, procurements by the Federal government do not currently include this type of certification, and we do not understand the basis for FCC consideration of this action. Second, as listed in the notice, the current approach of the FCC is to notify applicants that the relevant laws may impose obligations. It is our view, based on analysis of the law and current implementation of the law, that this requirement is sufficient and consistent with the FCC's current authority.

D. Virtual Schools

SIIA encourages the FCC to examine and make modifications to the E-Rate as necessary to enable the participation of virtual schools as appropriate. Just as technology is constantly evolving, so too are school models such as those Internet-based schools made possible by this new technology. To meet the law's intent, the E-Rate must serve these schools, including by taking into account their unique nature and needs. To do otherwise would be to create a bias against these schools and to violate the spirit inherent in the FCC's goal of maintaining competitive neutrality.

II. Post Commitment Program Administration

A. BEAR Option

The non-traditional nature of the E-Rate as a discount, as opposed to a grant, program presents applicants with a number of application and implementation challenges. SIIA encourages the continuation and enhancement of program flexibility to ease this burden, including with regard to the effective Billed Entity Applicant Reimbursement (BEAR) process. To that end, SIIA urges that service providers be required to offer applicants the option of either making up-front payments for the full cost of services and being reimbursed via the BEAR form process or paying only the non-discounted portion up front. Such a choice will enable applicants to most easily integrate the E-Rate into their budget and budget process.

B. Remittal of BEAR Payments

The non-traditional nature of the E-Rate and BEAR process also impose some burdens on service providers who must adapt their billing cycles and processes. SIIA therefore supports an extension from 10 days to 20 days of the time period within which providers must remit to the billed entity the discount reimbursement payment from the Administrator. This extension will better enable providers to meet their obligations. At the same time, applicants can weigh the impact of this extended remittance period when determining whether to participate in the BEAR process.

C. Equipment Transferability

SIIA supports efforts to modify equipment transferability and related rules to ensure limited E-Rate resources are targeted to eligible applicants and are employed most efficiently. SIIA is concerned that E-Rate funds continue to be insufficient to address priority two internal connections demands by all but the most high-poverty applicants. SIIA therefore supports modifications that limit both the ability and incentive for applicants to gain repeated discounts for priority two internal connections if such uses violate the spirit of the E-Rate's eligibility and implementation rules. At the same time, this modification must be careful to balance the legitimate needs of applicants to update their technologies.

D. Use of Excess Services

SIIA supports expansion of the Alaska Order to allow utilization of excess services obtained through the universal service mechanism by other entities and for other purposes. This allowance encourages a more efficient use of public investments by leveraging E-Rate and educational resources to better service the communities needs. SIIA supports the following four conditions for such use of excess services: (1) discounts be requested and provided only for services reasonably necessary for educational purposes; (2) additional use does not impose additional costs on the E-Rate; (3) services be sold on the basis of a price that is not usage sensitive; and (4) discounted services be used in the first instance for educational purposes and be used for additional purposes only when the applicant school or library is not using the services.

III. Appeals

A. Appeals Procedure

SIIA supports the proposal to increase the time limit for filing an appeal with both the Committee of the Schools and Libraries Division and the Commission from 30 days to 60 days. This extended time period is often necessary for applicants and service providers to evaluate the situation, determine a course of action and complete the appropriate appeals paperwork. If it would assist the Administrator, SIIA suggests the option of requiring applicants and service providers to formally note their intent to file an appeal within 30 days, provided participants receive the full 60 days to file the appeal itself.

B. Funding of Successful Appeals

SIIA urges that successful appeals should be fully funded to the same extent that they would have been funded in the initial application process had they not been initially denied such funding. This process is necessary to ensure a fair and equitable distribution of funds. Should that funding year's appeal reserve be depleted, SIIA would suggest using funds from the next or previous funding year as available and appropriate. At the same time, it appears that this potential funding shortage could largely be offset by the excess availability of unused funds, particularly those left when service providers or applicants fail to submit documentation to receive committed funding.

IV. Independent Audits

To the degree the Administrator pursues audits of recipients or service providers where the Administrator has reason to believe that potentially serious problems exist or is directed by the Commission, SIIA urges that such audits be conducted at recipients' and service providers' expense only in cases where such audit confirms conduct related to the E-rate was willfully, intentionally and knowingly carried out in violation of E-Rate regulations. Absent such findings and proof of wrongdoing, the financial burden of conducting such audits should be placed on the Administrator and the entire E-Rate program.

V. Unused Funds

SIIA commends the Commission for the many steps taken to minimize the extent to which authorized and allocated funds are not disbursed. Nonetheless, for various reasons, a significant amount of funds are not disbursed each year. As a result, SIIA urges that the Commission's rules be clarified to require expressly the distribution of the unused or undisbursed funds in subsequent years of the schools and libraries program regardless of whether that results in annual disbursements in excess of the annual cap.

Failure to use the full $2.25 billion annual fund authority in a given program year should not result in an ultimate failure to disburse those funds in a future year. E-Rate applicants should not be penalized by either the administrative process that delays or miscalculates funding demand or by the actions of service providers or other applicants failing to submit documentation to receive

committed funding. Rather than crediting unused funds to contributors, SIIA urges those funds be redirected internally to the E-Rate program.

This use of unused funds in future years would not violate the $2.25 billion cap on "funding authority," but would simply recognize an administrative process that requires more than 12 months to disburse program funds. In fact, Section 54.507(a) of the Commission's rules states, "The annual cap on federal universal service support for schools and libraries shall be $2.25 billion per funding year, and all funding authority for a given funding year that is unused in that funding year shall be carried forward into subsequent funding years for use in accordance with demand." Were the intent to credit back unused program funds to contributors and not to use those funds to meet demand, there would be no reason to carry forward unused funding authority as described in this rule. The Commission need look no further than the federal appropriations process and its differentiation between "budget authority" and "outlays" for a similar budgeting model.

VI. Funding Cap

The subsequent disbursement of unused funds, as urged above, will help meet the gap between demand and E-Rate funding. However, only an increase in the $2.25 billion annual E-Rate cap will enable the FCC to meet the applicant demand that has exceeded $5 billion in recent years. Meeting this gap is especially critical to enable eligible applicants to fully leverage their telecommunications and Internet access. These applicants, including those high-poverty applicants eligible for 70% to 80% discounts, have not been able to take advantage of internal connections due to the lack of funding. Yet, this infrastructure is necessary for them to take full advantage of priority one telecommunications and Internet access and the benefits it brings. Without E-Rate resources, these high-poverty applicants will be unable to take the next step toward technology integration. As such, SIIA urges the FCC to increase the $2.25 billion annual E-Rate cap.

Thank you again for considering SIIA's comments regarding the schools and libraries universal support mechanism. SIIA and our member companies look forward to working with you on these and related issues to ensure the law meets its goal of increased technology access and its ultimate promise of technology integration to improve educational access and outcomes. If we can be of further assistance, please contact us or Mark Schneiderman, SIIA Director of Education Policy, at (202) 789-4444 or marks@siia.net.

Respectfully Submitted,

Ken Wasch
President

Mark Bohannon, General Counsel &
VP, Government Affairs

Software & Information Industry Association
1090 Vermont Ave, NW, 6th Floor
Washington, DC 20005
(202) 289-7442