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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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In the Matter of )  
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Schools and Libraries Universal Service )  
Support Mechanism )  
 )

CC Docket No. 02-6

**SECOND REPORT AND ORDER AND  
FURTHER NOTICE OF PROPOSED RULEMAKING**

Adopted: April 23, 2003

Released: April 30, 2003

**Comment Date:** 30 days after publication in the Federal Register  
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By the Commission: Chairman Powell, Commissioners Abernathy, Copps, and Adelstein issuing separate statements.

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#### **I. INTRODUCTION**

1. In this Order, we take major steps to simplify and streamline the operation of our universal service mechanism for schools and libraries, while improving our oversight over the support mechanism. In section 254 of the 1996 Act, Congress directed the Commission to establish explicit universal service support mechanisms to ensure the delivery of affordable telecommunications service to all Americans, including low-income consumers, rural health care providers, and eligible schools and libraries.<sup>1</sup> Pursuant to section 254, eligible schools, libraries, and consortia that include eligible schools and libraries, may receive discounts for eligible telecommunications services, Internet access, and internal connections.<sup>2</sup> The Commission has

<sup>1</sup> 47 U.S.C. § 254. See also Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 36 (1996) (“1996 Act”).

<sup>2</sup> 47 C.F.R. §§ 54.502, 54.503.

issued several orders interpreting rules governing the operation of the schools and libraries universal service support mechanism.<sup>3</sup>

2. Since the inception of the schools and libraries support mechanism in 1997, schools and libraries have received over \$9.6 billion in funding commitments.<sup>4</sup> This funding has provided millions of school children and library patrons access to modern telecommunications and information services. The Commission previously sought comment in a Notice of Proposed Rulemaking (*Schools and Libraries NPRM*) on ways to streamline the operation of the schools and libraries support mechanism, in order to ensure that the benefits of this universal service support mechanism for schools and libraries are distributed in a manner that is fair and equitable and improve our oversight over this program to ensure that the goals of section 254 are met without waste, fraud, and abuse.<sup>5</sup>

3. In response to the *Schools and Libraries NPRM*, the Commission received a tremendous outpouring of ideas and suggestions relating to the operation of the schools and libraries mechanism. In this Second Report and Order (Order), we adopt a number of rules to streamline program operation and promote the Commission's goal of reducing the likelihood of fraud, waste, and abuse.<sup>6</sup> First, we modify certain rules regarding eligible services. In particular, we clarify the statutory term "educational purposes." We clarify that our rules prohibit the funding of discounts for duplicative services. We also clarify our rules to ensure that wireless services are eligible to the same extent wireline services are eligible. We modify our rules to make voice mail eligible for discounts. Second, we direct the Universal Service Administrative Company (USAC or Administrator) to develop a pilot program testing an online list of internal connections equipment that is automatically eligible for discounts, provided the uses are eligible and all other funding requirements are satisfied. Third, we codify the "30 percent" policy, which is a processing benchmark currently used by the Administrator when reviewing requests that include both ineligible and eligible services.

4. With regard to post commitment program administration, we adopt a rule

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<sup>3</sup> See, e.g., *Universal Service Order; Request for Review by Brooklyn Public Library, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-149423, CC Dockets No. 96-45 and 97-21, Order, 15 FCC Rcd 18598 (2000) ("*Brooklyn Order*"); *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Request for Review by Integrated Systems and Internet Solutions, Inc., of the Decision of the Universal Service Administrator, Request for Review by Education Networks of America of the Decision of the Universal Service Administrator, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734 (1999) ("*Tennessee Order*").

<sup>4</sup> See Universal Service Administrative Company, Schools and Libraries Division website, <<http://www.sl.universalservice.org/funding/y1/national.asp>> (1998 data); <<http://www.sl.universalservice.org/funding/y2/national.asp>> (1999 data); <<http://www.sl.universalservice.org/funding/y3/national.asp>> (2000 data); <<http://www.sl.universalservice.org/funding/y4/national.asp>> (2001 data); <<http://www.sl.universalservice.org/funding/y5/national.asp>> (2002 data).

<sup>5</sup> *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Notice of Proposed Rulemaking and Order, 17 FCC Rcd 1914 (2002) ("*Schools and Libraries NPRM*").

<sup>6</sup> We do not address in this Order all issues raised in the *Schools and Libraries NPRM*. We anticipate addressing additional issues raised in the *Schools and Libraries NPRM* in subsequent proceedings.

requiring service providers to give applicants the choice each funding year whether to pay the discounted price or pay the full price and then receive reimbursement through the Billed Entity Applicant Reimbursement (BEAR) process, and adopt a rule expressly requiring service providers to remit BEAR payments to the applicant within 20 days after receipt of such payments from the Administrator.

5. With regard to appeals, we permanently extend the time limit for filing an initial appeal with the Schools and Libraries Division (SLD) and the Commission from 30 to 60 days and conclude that all appeals should be treated as filed on the date that they are postmarked. We also conclude that all successful appeals should be funded to the extent that they would have been funded had the discounts been awarded through the normal funding process. We also make a minor procedural change to our rules relating to filing appeals in this docket.

6. As part of our ongoing efforts to limit waste, fraud, and abuse, we adopt rules to prevent bad actors from receiving benefits associated with the schools and libraries mechanism. In particular, we conclude that anyone convicted of a criminal violation or found civilly liable for actions relating to this program shall be debarred from participation for three years, absent extraordinary circumstances. Also, we decline at this time to adopt further measures to reduce unused funds, in light of our prior actions to streamline the program and increase the efficiency of fund use. We make conforming rule changes in accord with the No Child Left Behind Act of 2002, and we delete certain obsolete sections of our rules.

7. After consideration of many of the important issues raised in the comments to the *Schools and Libraries NPRM*, we find that it is appropriate to seek further comment on several additional matters. Therefore, in the Further Notice of Proposed Rulemaking (Further Notice), we seek comment on additional proposals to further improve the operation of the schools and libraries support mechanism. In particular, we seek comment on specific rules and procedures implementing the Commission's policy to carry forward unused funds from the schools and libraries support mechanism in subsequent funding years of the schools and libraries support mechanism adopted in the First Report and Order (*First Order*) adopted in this docket.<sup>7</sup> We seek comment regarding our existing rules governing the filing of an applicant's technology plan, and the viability of an online computerized eligible services list. We also seek comment on additional measures to limit waste, fraud, and abuse.

## II. PROGRAM OVERVIEW AND BACKGROUND

8. Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries, may receive discounts for eligible telecommunications services, Internet access, and internal connections.<sup>8</sup> In order to receive discounts on eligible services, the Commission's rules require that the school or library submit to the Administrator a completed FCC Form 470, in which the applicant sets forth its technological needs and the services for which it seeks discounts.<sup>9</sup> Once the school or library has complied with the Commission's competitive bidding requirements and entered into

<sup>7</sup> See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Report and Order, 17 FCC Rcd 11521 (2002) ("*First Order*").

<sup>8</sup> 47 C.F.R. §§ 54.502, 54.503.

<sup>9</sup> 47 C.F.R. § 54.504(b)(1), (b)(3).

agreements for eligible services, it must file an FCC Form 471 application to notify the Administrator of the services that have been ordered, the service providers with whom the applicant has entered into an agreement, and an estimate of funds needed to cover the discounts to be given for eligible services.<sup>10</sup>

9. The Administrator reviews the FCC Forms 471 that it receives and issues funding commitment decisions indicating discounts that the applicant may receive in accordance with the Commission's rules. Subsequently, the applicant either: (1) pays the bill in full, and seeks reimbursement for discounts from the Administrator via the service or equipment provider, or (2) pays the non-discount portion of the service cost to the service provider, who, in turn, seeks reimbursement from the Administrator for the discounted amount.<sup>11</sup>

10. The Administrator acts on these requests pursuant to established procedures in accord with Commission directions and decisions. If the Administrator denies a request for funding, the applicant may either appeal directly to the Commission, or appeal to the Administrator. If rejected on appeal by the Administrator, the applicant may appeal to the Commission.<sup>12</sup> Since inception, the program has experienced a tremendous expansion of both the number of applicants and recipients, and the number of appeals regarding decisions and procedures.

11. As the program approached its fifth year of operation, the Commission issued the *Schools and Libraries NPRM* to seek comment on ideas raised by both the applicant and service provider communities for improving the program. In particular, the Commission sought comment on ways to ensure that the program funds are utilized in an efficient, effective, and fair manner, while preventing waste, fraud, and abuse. One hundred and twenty-seven parties filed comments and 25 parties filed reply comments.<sup>13</sup>

12. On June 13, 2002, we released the *First Order*, which adopted a framework for the treatment of unused funds from the schools and libraries universal service support mechanism.<sup>14</sup> In that order, we determined that it was in the public interest to take immediate action to stabilize the contribution factor, while the Commission considered whether and how to reform the way in which contributions to the universal service mechanism are assessed.<sup>15</sup> We

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<sup>10</sup> 47 C.F.R. § 54.504(c).

<sup>11</sup> Schools and Libraries Universal Service, Billed Entity Applicant Reimbursement Form, OMB 3060-0856 (October 1998) (FCC Form 472 or BEAR Form); Schools and Libraries Universal Service, Service Provider Invoice Form, OMB 3060-0856 (October 2001) (FCC Form 474 or SPI Form).

<sup>12</sup> See 47 C.F.R. § 54.719.

<sup>13</sup> See Appendix A.

<sup>14</sup> See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Report and Order, 17 FCC Rcd 11521 (2002) ("*First Order*").

<sup>15</sup> See *id.*; *Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans With Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing Format*, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170,

(continued....)

also concluded that beginning no later than the second quarter of 2003, which began April 1, 2003, any unused funds from the schools and libraries support mechanism shall, consistent with the public interest, be carried forward for disbursement in subsequent funding years of the schools and libraries support mechanism.<sup>16</sup> Additionally, we stated our intent to “develop specific rules implementing this policy not later than second quarter 2003 in order to maximize the availability of these funds for schools and libraries.”<sup>17</sup>

### III. SECOND REPORT AND ORDER

#### A. Eligible Services

13. *Background* In section 254 of the Act, Congress instructed the Commission to establish a universal service support mechanism for eligible schools and libraries. Section 254(c)(3) states that “[I]n addition to the services included in the definition of universal service under paragraph (c)(1), the Commission may designate additional services for such support mechanisms for schools, [and] libraries . . . for the purposes of subsection [254](h).”<sup>18</sup>

14. Section 254 imposes a number of restrictions on schools and libraries receiving discounted services under the universal service mechanism. Among other things, section 254(h)(1)(B) requires that any services requested by schools and libraries be used for “educational purposes.” That section also specifies that schools and libraries make a “bona fide request” for services within the definition of universal service.<sup>19</sup>

15. In implementing these statutory provisions, the Commission concluded that telecommunications services, internet access, and internal connections would be funded.<sup>20</sup> The Commission concluded that schools and libraries “should have maximum flexibility to purchase the package of services they believe will most effectively meet their communications needs.”<sup>21</sup> The Commission adopted a requirement, codified in section 54.504(b)(2)(ii) of the rules, that schools and libraries certify that the services obtained through discounts would be used solely for educational purposes.<sup>22</sup> The Commission also adopted a requirement that schools and libraries prepare a technology plan, to be approved by the state, the Administrator, or an independent agency approved by the Commission, to ensure that requests for discounts “are based on the reasonable needs and resources of the applicant.”<sup>23</sup>

(...continued from previous page)

Further Notice of Proposed Rulemaking and Report and Order, FCC 02-43, 67 FR 11268, paras. 15, 71 (rel. Feb. 26, 2002) (*Contribution FNPRM*).

<sup>16</sup> *First Order*, 17 FCC Rcd at 11523-11524.

<sup>17</sup> *Id.* at 11524.

<sup>18</sup> 47 U.S.C. § 254(c)(3).

<sup>19</sup> 47 U.S.C. § 254(h)(1)(B).

<sup>20</sup> See 47 C.F.R. §§ 54.506, 54.503, 54.502.

<sup>21</sup> *Universal Service Order*, 12 FCC Rcd at 9002, para. 425.

<sup>22</sup> 47 C.F.R. § 54:504(b)(2)(i).

<sup>23</sup> See *Universal Service Order*, 12 FCC Rcd 9078, para. 574. See also 47 C.F.R. § 54.504(b)(vii).

16. In the *Schools and Libraries NPRM*, we sought comment on changes in the application process that relate to eligible services. We invited parties to submit proposals for changes that would improve the operation of the eligibility determination process in terms of efficiency, predictability, flexibility, and administrative cost. In response, commenters addressed a broad range of issues relating to the eligibility process, including the scope of the requirement that services be used for educational purposes, whether support is available for duplicative services, eligibility of wireless services, eligibility of voice mail, and the potential use of a computerized eligible services list.

17. *Educational Purpose* We find it appropriate to clarify the scope of the requirement that services be used for an educational purpose. Accordingly, we amend section 54.500 of our rules to clarify the meaning of educational purposes.<sup>24</sup> Pursuant to this requirement, the Administrator has denied requests for services to be used by support staff not involved in instructional activities.<sup>25</sup> We reiterate our recognition that the technology needs of participants in the schools and libraries program are complex and unique to each participant.<sup>26</sup> We find that, in the case of schools, activities that are integral, immediate, and proximate to the education of students, or in the case of libraries, integral, immediate, and proximate to the provision of library services to library patrons, qualify as educational purposes under this program. To guide applicants in preparing their applications and to streamline the Administrator's review of applications, we further establish a presumption that activities that occur in a library or classroom or on library or school property are integral, immediate, and proximate to the education of students or the provision of library services to library patrons.

18. This clarification, however, is not intended to allow the general public to use services and facilities obtained through this support mechanism for non-educational purposes. In the *Alaska Order*, the Commission granted the State of Alaska a limited waiver of section 54.504(b)(2)(ii) of the Commission's rules, allowing members of rural remote communities in Alaska that lack local or toll-free dial-up access to the Internet to use excess service obtained through the support mechanism, when the services are not in use by the schools and libraries.<sup>27</sup> The clarification we adopt today does not affect the terms of Alaska's waiver or allow schools or libraries outside the scope of that waiver to provide services to the general public in that manner.

19. Under this standard, reasonable requests for any supported service – over any technology platform – to be used by any school or library staff while in a library, classroom, or on school or library property, shall be eligible for discounts. Moreover, we conclude that in

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<sup>24</sup> See Appendix B.

<sup>25</sup> See SLD web site, Eligible Services List (October 17, 2001) <<http://www.sl.universalservice.org/reference/eligible.asp>>.

<sup>26</sup> See *Universal Service Order*, 12 FCC Rcd at 9076, para. 571.

<sup>27</sup> *Federal-State Joint Board on Universal Service, Petition of the State of Alaska for Waiver for the Utilization of Schools and Libraries Internet Point-of-Presence in Rural Remote Alaska Villages Where No Local Access Exists and Request for Declaratory Ruling*, CC Docket No. 96-45, Order, FCC 01-350 (rel. Dec. 3, 2001) (*Alaska Order*). The waiver applied where: (1) there is no local or toll-free Internet access available in the community; (2) the school or library has not requested more services than are necessary for educational purposes; (3) no additional costs will be incurred; (4) any use for non-educational purposes will be limited to hours in which the school or library is not open; and (5) the excess services are made available to all capable service providers in a neutral manner that does not require or take into account any commitments or promises from the service providers. *Id.*

certain limited instances, the use of telecommunications services offsite would also be integral, immediate, and proximate to the education of students or the provision of library services to library patrons, and thus, would be considered to be an educational purpose.<sup>28</sup> By adopting this standard, we provide to schools and libraries and the state and local authorities that govern them a more definitive interpretation of educational purposes, in order to assist them in pursuing their programmatic objectives.

20. We find that our clarification is consistent with statutory mandates that the purpose for which support is provided be for educational purposes in a place of instruction.<sup>29</sup> Moreover, this clarification benefits applicants because it simplifies the application process by making the approval of discounted services more predictable, without sacrificing flexibility, thus furthering our streamlining goals. Because of the difficulties inherent in implementing changes in eligibility in the middle of a funding cycle, services will be available under this clarification beginning with the start of the next funding year (Funding Year 2004), on July 1, 2004.

21. We believe that this interpretation of educational purpose should not result in an increase in waste, fraud, or abuse. First, as the presumption set forth above demonstrates, discounts will only be awarded to support activities that have a defined nexus to education, or, in the case of libraries, to the delivery of library services to library patrons. Thus, for instance, using a school's or a library's discounted telecommunications services to support a private enterprise or a political campaign will continue to be a violation of the Act and our rules. In addition, because our rules require schools and libraries to pay a percentage of the cost of services, schools and libraries are unlikely to request services that are not economical. This is particularly true in an environment where many institutions face shrinking budgets. We therefore conclude this clarification of educational purpose should increase program efficiency without leading to waste, fraud, or abuse.

22. *Funding of Duplicative Services* In the *Universal Service Order*, the Commission indicated that an applicant's request for discounts should be based on the reasonable needs and resources of the applicant, and bids for services should be evaluated based on cost-effectiveness.<sup>30</sup> Pursuant to this requirement, the Administrator has denied discounts for duplicative services.<sup>31</sup> Duplicative services are services that deliver the same functionality to the same population in the same location during the same period of time. We emphasize that requests for discounts for duplicative services will be rejected on the basis that such applications cannot demonstrate, as required by our rules, that they are reasonable or cost effective.

23. We find that the use of discounts to fund duplicative services contravenes the

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<sup>28</sup> The following are examples off-site activities that would be integral, immediate, and proximate to the education of students or the provision of library services to library patrons, and thus, would be considered to be an educational purpose: a school bus driver's use of wireless telecommunications services while delivering children to and from school, a library staff person's use of wireless telecommunications service on a library's mobile library unit van, and the use by teachers or other school staff of wireless telecommunications service while accompanying students on a field trip or sporting event.

<sup>29</sup> 47 U.S.C. §§ 254(h)(1)(B), 254(b)(6), 254(h)(2)(A).

<sup>30</sup> *Universal Service Order*, 12 FCC Rcd at 9029-9030, 9078, paras. 481, 574.

<sup>31</sup> See, e.g., SLD website, Eligibility for On-Premise Priority 1 Equipment, <<http://www.sl.universalservice.org/reference/OnPremPI.asp>>.

requirement that discounts be awarded to meet the “reasonable needs and resources” of applicants.<sup>32</sup> We find that requests for discounts for duplicative services are unreasonable because they impact the fair distribution of discounts to schools and libraries. The schools and libraries mechanism of the universal service fund is capped at \$2.25 billion dollars.<sup>33</sup> Under our rules, when total demand exceeds the cap, discounts for Priority Two services (internal connections) are awarded after all Priority One requests are satisfied, beginning with the most economically disadvantaged schools and libraries as determined by the schools and libraries discount matrix.<sup>34</sup> Total demand for discounts from the schools and libraries program has exceeded the funding cap in the past two funding years and we expect this trend to continue.<sup>35</sup> Thus, funding duplicative services would operate to award discounts to applicants higher on the matrix twice for the same services, while some others, because of their lower rank on the matrix, could not receive discounts for the same service because the Priority Two funds available under the cap had had been exhausted.

24. In addition, we find that it is inconsistent with the Commission’s rules to deliver services that provide the same functionality for the same population in the same location during the same period of time. We believe that requests for duplicative services are not consistent with the Commission’s rules regarding competitive bidding, which require applicants to evaluate whether bids are cost effective. In the *Universal Service Order*, the Commission stated that price is the primary of several factors to be considered.<sup>36</sup> Thus, applicants must evaluate these factors to determine whether an offering is cost effective.<sup>37</sup> We find that it is not cost effective for applicants to seek discounts to fund the delivery of duplicative services. Therefore, we conclude that this rule can be violated by the delivery of services that provide the same functionality for the same population in the same location during the same period of time.<sup>38</sup> We recognize that determining whether particular services are functionally equivalent may depend on the particular circumstances presented. In addition, we amend section 54.511(a) of our rules to make clear that

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<sup>32</sup> *Universal Service Order*, 12 FCC Rcd at 9078, para. 574.

<sup>33</sup> 47 C.F.R. § 54.507.

<sup>34</sup> *Id.* The discount matrix reflects an applicant’s urban or rural status and the percentage of students eligible for a free or reduced price lunch under the national school lunch program or another federally-approved alternative mechanism. See 47 C.F.R. § 54.505.

<sup>35</sup> USAC notified the Wireline Competition Bureau (formerly the Common Carrier Bureau) that estimated demand for Funding Year 2002 (July 1, 2002 to June 30, 2003) was \$5.736 billion. See Letter from George McDonald, Vice President, *Universal Service Administrative Company*, Schools and Libraries Division, to Dorothy Attwood, Chief, Common Carrier Bureau, Federal Communications Commission, dated February 28, 2002. Estimated demand for Funding Year 2001 (July 1, 2001 to June 30, 2002) was \$5.195 billion. See Letter from Kate L. Moore, President, *Universal Service Administrative Company*, Schools and Libraries Division, to Dorothy Attwood, Chief, Common Carrier Bureau, Federal Communications Commission, dated April 17, 2001.

<sup>36</sup> *Universal Service Order*, 12 FCC Rcd at 9029-9030, para. 481. Additional factors that an applicant should consider—when permitted by state and local procurement rules—include “prior experience, including past performance; personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives.” *Id.*

<sup>37</sup> *Universal Service Order*, 12 FCC Rcd at 9029-9030, para. 481.

<sup>38</sup> For example, requests for discounts to support internal connections provided through a Private Branch Exchange (PBX) and through a Com Key System at the same location during the same time period would be considered duplicative.

applicants must consider whether the service is cost effective.<sup>39</sup>

25. *Eligibility of Wireless Services* Under section 254(h)(1)(B), eligible schools, libraries, and consortia that include eligible schools and libraries, are eligible for discounts on telecommunications services.<sup>40</sup> Accordingly, basic telephone service, which includes mobile and fixed wireless service, is eligible for discounts pursuant to the schools and libraries universal service support mechanism. The cost of telephones or associated maintenance of equipment is not eligible for discount.<sup>41</sup> In the *Schools and Libraries NPRM*, we sought comment on whether we needed to modify any rules and policies regarding the eligibility of wireless services.<sup>42</sup> We also sought comment on whether broadening the eligibility of wireless services under the schools and libraries universal service support mechanism, consistent with the statute, would improve the application review process.<sup>43</sup>

26. We reiterate that wireline and wireless telecommunications services are equally eligible under our current rules. If wireless service is used at the school or library for educational purposes, that service is eligible for support to the same extent as requests for wireline-based telecommunications services. We emphasize that, under existing rules, requests for wireline and wireless services must be reviewed under the same standard. It would be inappropriate, for instance, to presume that wireline services are used for educational purposes while presuming that wireless services are not used for similar purposes. What is relevant, for purposes of determining compliance with the statutory standard, is whether the service in question is integral, immediate, and proximate to the provision of education or library services, regardless of the technology platform. As we stated above, we presume that activities that occur in a library or classroom or on library or school property, are integral, immediate, and proximate to education of students, or, in the case of libraries, to the provision of library services to library providers, and therefore qualify as educational purposes.

27. We believe that this restatement of technology neutrality, in tandem with our clarification of educational purposes set forth above, will serve to reduce confusion and uncertainty regarding the eligibility of wireless services and thus further our streamlining efforts by making the application process more predictable for applicants.

28. *Eligibility of Voice Mail* In the *Universal Service Order*, the Commission decided that certain information services<sup>44</sup> – namely Internet access – would be funded. The

<sup>39</sup> See Appendix B.

<sup>40</sup> See 47 U.S.C. § 254(h)(1)(B).

<sup>41</sup> See SLD web site, Eligible Services List (October 17, 2001) <<http://www.sl.universalservice.org/reference/eligible.asp>>.

<sup>42</sup> *Schools and Libraries NPRM*, 17 FCC Rcd at 1923, para. 21.

<sup>43</sup> *Id.*

<sup>44</sup> Information service is defined as “the offering of a capability for generating, acquiring, storing processing, retrieving, utilizing or making available information via telecommunications...” 47 U.S.C. § 153(20). Voice mail and voice messaging services have been classified as enhanced or information services. See *Bell Operating Companies Joint Petition for Waiver of Computer II Rules*, Order, 10 FCC Rcd 13,758, 13,770-74 (1995); *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, 6452 (1999).

Commission also determined, without further discussion, that voice mail would not “at [that] time” be eligible, based, in part, on the recommendation of the Federal-State Joint Board on Universal Service that such information services not be eligible.<sup>45</sup> Specifically, the Joint Board had recommended that, “by establishing a discount mechanism for telecommunications and Internet access, we conclude that the intent of Congress will be met and it is not necessary to support the full panoply of information services at this time.”<sup>46</sup> We now think it appropriate to revisit this issue, in light of our experience over the last five years.

29. The prevalence of and need for voice mail as a way of communicating with school and library staff for educational purposes causes us to reexamine the eligibility of voice mail. Virtually all commenters supported making voice mail an eligible service, including the state members of the Federal-State Joint Board on Universal Service.<sup>47</sup> After reviewing the record on this issue, we conclude that voice mail should be eligible for discounts as a Priority One service under the universal service support mechanism in the same way that Internet access, *i.e.*, e-mail, is currently eligible. Voice mail services are used in conjunction with telecommunications services. We agree with commenters that voice mail is functionally equivalent to e-mail.<sup>48</sup> Therefore, we believe that it is administratively and operationally appropriate for such requests to be processed within the same priority as telecommunications services and Internet access.<sup>49</sup> After five years of experience with the schools and libraries universal service support mechanism, we find that making voice mail now eligible for discount is consistent with Congress’s intent “to enhance... access to advanced telecommunications and information services” for schools and libraries. Indeed, voice mail is an integral part of communications, especially in schools. We conclude that voice mail enhances access to information services for schools and libraries by allowing meaningful communication among parents, teachers, and school and library administrators.<sup>50</sup>

<sup>45</sup> *Universal Service Order*, 12 FCC Rcd at 9013, para. 444; *see Federal-State Joint Board on Universal Service*, CC Docket 96-45, Recommended Decision, 12 FCC Rcd 87, 324 (1996) (*Recommended Decision*).

<sup>46</sup> *Recommended Decision*, 12 FCC Rcd at 324.

<sup>47</sup> *See* Letter from G. Nanette Thompson, State Chair of the Joint Board on Universal Service to Michael K. Powell, Chairman, Federal Communications Commission, filed November 8, 2002.

<sup>48</sup> *See, e.g.*, California DOE at Comments at 5; Cleveland MSD Comments at 4; Great City Comments at 3; LA USD Comments at 3-4; New York State Education Department Comments at 2; Rural School and Community Trust Comments at 2; Wisconsin DPI Comments at 5; York County Library Comments at 2.

<sup>49</sup> In order to prevent an unnecessary administrative burden for applicants associated with the addition of voice mail as an eligible service, we conclude that applicants may include requests for voice mail in funding requests for telecommunications services or Internet access services. Our conclusion is not intended in any way to alter longstanding Commission precedent that voice mail is an information service.

<sup>50</sup> *See, e.g.*, Edison Schools Comments at 1 (“Voicemail allows for parents and teachers to stay in meaningful contact with a minimal disruption of critical instruction time”); Illinois BOE Comments at 14 (“Voice mail has become more and more important in communicating with school staff for educational purposes”); Inclusive Technologies Comments at 3 (“Voice mail has been used to create better school-home coordination”); Memphis City Schools Comments at 1 (“Voice mail can play a significant role in communicating with parents and constituents...”); Montana Independent Telecommunication System Comments at 5 (“Voice mail is routinely used as a way of communicating with school and library staff for educational purposes”); NEA et al Comments at 8-9 (“Voicemail has made it possible for parents to contact teachers to express concerns about their children”); Siemens Reply at 2 (“Voice mail and messaging servers are a cost-effective method of exchanging information between the classroom, faculty, and administrators”). We note that E-Rate Elite argued that no costs savings in administration

(continued...)

30. Moreover, making voice mail eligible will reduce administrative costs, because neither applicants nor USAC will need to go through the exercise of breaking out the cost of voice mail from a bundled price for telecommunications service. We believe this modification will further our goals of improving program operation, without increasing opportunities for waste, fraud, and abuse. Accordingly, we deem voice mail to be eligible for discounts under the schools and libraries universal service support mechanism and amend sections 54.503, 54.507, and 54.517 of our rules.<sup>51</sup> We instruct USAC to process funding requests for voice mail services starting in Funding Year 2004 consistent with this *Order*.

31. Computerized Eligible Service List We conclude that it would be beneficial to develop a process that would simplify applicants' selection of eligible services. The Commission currently directs the Administrator to determine whether particular services fall within the eligibility criteria established under the 1996 Act and the Commission's rules and policies. The Administrator evaluates, in consultation with the Commission on an ongoing basis, particular services and products offered by service providers, and determines their eligibility. In order to provide applicants with general guidance, the Administrator makes available on its website a list of categories of service that are conditionally eligible or ineligible, although it does not identify specific eligible brands or items.<sup>52</sup> Applicants or service providers may appeal the Administrator's decision that a given service is ineligible for discounts only after a requested discount for that service is denied.

32. In the *Schools and Libraries NPRM*, we specifically sought comment on whether to establish an online computerized list of actual products and services, whereby applicants could select a specific product or service as part of their FCC Form 471 application.<sup>53</sup> We suggested that under such a proposal, the number of instances in which applicants seek funding for ineligible services might decrease. We also suggested that such a process would considerably simplify the application review process.<sup>54</sup> We sought comment on the desirability and feasibility of this approach. Specifically, we sought comment on how often such a list should be updated; how to ensure that such a list would not inadvertently limit access to products and services newly introduced to the marketplace; and how to obtain input on an ongoing basis regarding what specific products and services should be eligible.<sup>55</sup>

33. After reviewing the record, we conclude that there is merit to creating an online computerized list system for internal connections. We decline, however, to mandate a similar computerized list system at this time for telecommunications services and Internet access.

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review would be realized by making voice mail an eligible service. See E-Rate Elite Comments at 14. We base our decision here, in part, on the need for voice mail as part of an integrated telecommunications system in schools and libraries.

<sup>51</sup> See Appendix B.

<sup>52</sup> See SLD web site. Eligible Services List (October 17, 2001)  
<<http://www.sl.universalservice.org/reference/eligible.asp>>.

<sup>53</sup> See FCC Form 471.

<sup>54</sup> *Schools and Libraries NPRM*, 17 FCC Rcd at 1921, para. 14.

<sup>55</sup> *Id*

34. In general, we agree with commenters that such a list would aid applicants to more clearly understand which items have already been approved by USAC as eligible.<sup>56</sup> Use of such a list should facilitate expedited processing of many funding requests, decrease rejection of requests for ineligibility, and decrease the chances that any ineligible request would be accidentally awarded discounts. The use of this list by applicants, therefore, should reduce the burden on applicants in completing their applications. In addition, use of such a list would streamline review by the Administrator, allowing it to focus on more complex matters arising in the application process. Finally, by helping to avoid support of ineligible services, an online computerized list would further the Commission's goal of preventing fraud and abuse.

35. At the same time, we are persuaded by the Administrator's concerns and those of certain commenters that such a list should be developed with care. For example, the list should be careful not to favor certain vendors over others. Thus, we conclude that the development of such a list should proceed in stages. The Administrator should first test the use of such a list on a limited portion of the eligible services and products list. Therefore, we direct USAC, in conjunction with the Wireline Competition Bureau (Bureau), to develop and test as a pilot program an online list for internal connections equipment. We believe that such a pilot program would assist in further developing a record regarding how such a list could, in practice, provide clearer guidance about the potential eligibility of telecommunications and Internet access services than the current website posting.

36. We direct the Administrator to design a pilot program in consultation with the Bureau that is in keeping with the following principles: (1) the pilot system should continue to allow flexibility of choice of products by applicants; (2) this list should operate as a safe harbor, rather than a complete list of all eligible items; (3) all equipment and services listed will be automatically eligible for discounts provided the use is eligible and other funding requirements are satisfied; (4) there should be a procedure to have new products added to the list; (5) applicants and service providers may use the existing appeals procedures to appeal decisions by the Administrator rejecting the addition of specific items on the list; (6) applicants may also seek support for internal connections equipment that is not on this list; (7) such requests will be evaluated consistent with the Administrator's existing practice of ensuring that the equipment and proposed use are consistent with educational purposes.<sup>57</sup>

37. We expect that the Administrator will be able to implement the pilot program no later than Funding Year 2005. The Administrator will timely report to the Commission about the effectiveness of the program during and after successful implementation. USAC's report should include information that details the effect of the list on the administrative review process, including the cost, and the number of applicants making use of such a list. We will evaluate this data and take it into consideration when evaluating whether and how to proceed to make this list accessible from the online FCC Form 471, and whether and how to incorporate telecommunications and Internet access services into such a list. In addition, in the accompanying Further Notice we seek further comment on the feasibility of an online eligible

<sup>56</sup> See Colorado DOE Comments at 2; Rural Schools Community and Trust Comments at 3.

<sup>57</sup> See generally SLD web site, Eligible Services List (October 17, 2001) <<http://www.sl.universalservice.org/reference/eligible.asp>>.

services brand name list for telecommunications services and Internet access.<sup>58</sup>

## B. Codification of 30 Percent Policy

38. *Background* Currently, the Administrator utilizes a 30 percent processing benchmark when reviewing requests that include both eligible and ineligible services.<sup>59</sup> If less than 30 percent of the request seeks discounts for ineligible services, the Administrator normally will consider the request and issue a funding commitment for the eligible services, denying discounts only for the ineligible part. If 30 percent or more of the request seeks discounts for ineligible services, the Administrator will deny the funding request in its entirety. Because the Administrator's annual administrative costs are drawn from the same \$2.25 billion that supports the award of discounts, an increase in the administrative costs of eligibility review directly reduces the amount of funds available for actual discounts.

39. In the *Schools and Libraries NPRM*, we sought comment on the operational benefits and burdens of the 30 percent policy.<sup>60</sup> We also sought comment on whether there are alternative procedures that would improve program operation, while still providing appropriate incentives to applicants to seek discounts only for eligible services.<sup>61</sup>

40. *Discussion* We conclude that the 30 percent policy should be codified in the Commission's rules. We find that the procedure improves program operation and is important in reducing the administrative costs of the program because it enables SLD to efficiently process requests for support for services that are eligible for discounts but that also include some ineligible components. We further find that the 30 percent policy provides an appropriate incentive to applicants to seek discounts for only eligible products and services. We find that the 30 percent policy provides an adequate safe harbor for applicants that inadvertently request ineligible products or services, and appropriately balances applicant accountability with effective administrative review. The 30 percent policy allows the Administrator to process efficiently requests for funding that contain only a small amount of ineligible services without expending significant fund resources working with applicants to determine what part of the discounts requested is associated with eligible services.<sup>62</sup> It also provides an incentive to applicants to eliminate ineligible services from their requests before submitting their applications, further reducing the Administrator's administrative costs.<sup>63</sup> Accordingly, we add section 54.504(c)(1) to

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<sup>58</sup> See *infra* para. 101.

<sup>59</sup> See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Third Report and Order in CC Docket No. 97-21 and Fourth Order on Reconsideration in CC Docket No. 97-21 and Eighth Order on Reconsideration in CC Docket No. 96-45, 13 FCC Rcd 25058 (1998); *Brooklyn Order*, 15 FCC Rcd 18598, 18602, 18607, at nn. 23, 46.

<sup>60</sup> *Schools and Libraries NPRM*, 17 FCC Rcd at 1925-6, paras. 26-27.

<sup>61</sup> *Id.* at 1926, para. 27.

<sup>62</sup> See *Request for Review of the Decision of the Universal Service Administrator by Anderson School, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-133664, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd 25610, 25612-25613, at para. 8 (Com. Car. Bur. 2000) (*Anderson School Order*). Therefore, we reject the argument of Intelenet that the administrative cost savings from the 30 percent policy are illusory. See Intelenet Comments at 3.

<sup>63</sup> *Anderson School Order*, 15 FCC Rcd at 25612-15613, para. 8.

our rules as provided in Appendix B.<sup>64</sup>

41. We decline to adopt one suggestion that would require SLD to inform an applicant that its application is about to be rejected under the 30 percent procedure and allow that applicant to provide evidence to refute SLD's determination.<sup>65</sup> Applicants bear the burden of ensuring that the items requested are eligible for support under the program rules. Implementation of such a proposal would result in greater administrative costs and burden, thereby defeating the primary purpose of this policy. Moreover, the applicant still has an opportunity to refute SLD's determination by availing itself of the appeals process.

### C. Choice and Timing of Payment Method

42. *Background* Under existing law and Commission procedure, the Administrator of the universal service support mechanism does not provide funds directly to schools and libraries, but rather, provides funds to eligible service providers who offer discounted services to eligible schools and libraries.<sup>66</sup> Under existing procedures, service providers and applicants are advised to work together to determine whether the applicant will either (1) pay the service provider the full cost of services, and subsequently receive reimbursement from the provider for the discounted portion, after the provider receives reimbursement through the Billed Entity Applicant Reimbursement (BEAR) process, or (2) pay the non-discounted portion of the cost of services, with the service provider seeking reimbursement from the Administrator for the discounted portion.<sup>67</sup> Currently, service providers reimbursing billed entities via the BEAR process must remit the discount amount authorized by the Administrator to the billed entity within ten days of receiving the reimbursement payment from the Administrator and prior to tendering or making use of the payment from the Administrator.<sup>68</sup>

43. In the *Schools and Libraries NPRM*, we sought comment on certain problems that have arisen in connection with the BEAR payment method. Because it is not clear in our rules whether the provider or the applicant may make the final determination of which of the two payment processes to pursue, we observed that the potential exists for service providers to insist that applicants to which they provide services use the BEAR method of paying the upfront costs, and later seeking reimbursement. Indeed, some providers require recipients to use the BEAR form.<sup>69</sup> We also noted that, in certain cases, services providers using the BEAR method had, after receiving the discount check from the Administrator, failed to remit this payment to the

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<sup>64</sup> See Appendix B.

<sup>65</sup> See Funds for Learning Comments at 8.

<sup>66</sup> See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Order, FCC 99-291, paras. 8-9 (rel. October 8, 1999) (*reconsideration pending*); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Order, FCC 00-350 (rel. October 26, 2000) (*appeal pending*), *United States Telecommunications Association v. Federal Communications Commission*, No. 00-1500, filed November 27, 2000.

<sup>67</sup> See SLD website, Form 472 BEAR Filing Guidance (April 27, 2001) <<http://www.sl.universalservice.org/reference/8bear.asp>>; FCC Form 472; FCC Form 474.

<sup>68</sup> See FCC Form 472 at 4.

<sup>69</sup> See LAUSD Comments at 5; NEC Comments at 17.

applicant until well past the ten-day limit.<sup>70</sup> In response to these problems, we sought comment on whether we should mandate that all service providers give applicants a choice between paying a discounted price and using the BEAR payment method.<sup>71</sup> We also sought comment on whether we should expressly provide in our rules that service providers are required to remit BEAR payments to the applicants within 20 days of having received them, in order to improve enforcement of the BEAR payment remittance deadline.

44. *Discussion* We first conclude that we should adopt a rule requiring service providers to give applicants the choice each funding year either to pay the discounted price or to pay the full price and then receive reimbursement through the BEAR process. In addition, we find that the period for remittance of the BEAR payment should be 20 days. Accordingly, we amend section 54.514 of our rules as set forth in Appendix B.<sup>72</sup>

45. Some commenters argued that the choice of payment method should ultimately be made by the service provider, asserting that a mandate requiring all providers to adopt billing systems capable of handling both payment methods would impose significant financial and administrative burdens, particularly on small providers.<sup>73</sup> However, the vast majority of commenters that responded to the *Schools and Libraries NPRM* supported the Commission's proposal.<sup>74</sup> Numerous commenters noted instances of services providers requiring applicants to use the BEAR method.<sup>75</sup>

46. We find that providing applicants with the right to choose payment method is consistent with section 254. Although section 254(h)(1)(B) requires that telecommunications carriers providing discounted service be permitted to choose the method by which they receive

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<sup>70</sup> *Schools and Libraries NPRM*, 17 FCC Rcd at 1929, para. 35.

<sup>71</sup> *Id.*, 17 FCC Rcd at 1929, para. 34.

<sup>72</sup> See Appendix B.

<sup>73</sup> See, e.g., Kellog Consulting Comments at 2; Sprint Comments at 9-10; Tel/Logic Comments at 10-11; Verizon Comments at 7-8; WorldCom Comments at 10-11. Some commenters suggest that applicants and providers should reach a mutual agreement as to the method of payment, but do not explain how the appropriate payment method would be determined in cases where the parties are unable to agree. See, e.g., BellSouth/SBC Comments at 14.

<sup>74</sup> See, e.g., ALA Comments at 38; Arkansas E-rate Comments at 6; Bakersfield SD Comments at 2; Boston Comments at 6-7; California DOE Comments at 3; Carnegie Library Comments at 1; Central Susquehanna Comments at 2; Colorado DOE Comments at 7; CCSSO Comments at 34; EdLiNC Comments at 17; Edu. Service D. 101 Comments at 3; Coalition for E-rate Reform Comments at 7; E-Rate Elite Comments at 6; Great City Comments at 4; Harris (Alabama DOE) Comments at 4; Illinois BOE Comments at 21; Integrity Comments at 2; Iowa DOE Comments at 8; Kila Comments at 1; LAUSD Comments at 5; Maine PUC Comments at 6; Marian High School Comments at 1; Memphis City Schools Comments at 2; Missouri OPC Comments at 3; MOREnet Comments at 9; Montana PSC Comments at 4; NEA et al Comments at 17; NYPL Comments at 4; NYCBOE Comments at 5; NC Library Comments at 1; Pennsylvania DOE Comments at 4; Scranton PL Comments at 1; Software & Info Comments at 4; Seattle PL Comments at 2; SVETN Comments at 2; TDI Comments at 10; Three Rivers Comments at 3; Trillion Comments at 2; Weisiger Comments at 26; Wisconsin DPI Comments at 5; York County Library Comments at 7. Few commenters discussed the impact upon small providers. See Rural School and Community Trust Comments at 4-6 (suggesting small providers should be allowed to choose), Alaska (saying BEAR is a burden on small providers), cf. Excaliber Comments (BEAR is not a burden on small providers if payment is timely).

<sup>75</sup> See, e.g., Great City Comments at 3; LAUSD Comments at 5; MOREnet Comments at 9; NEA et al Comments at 17; Scranton PL Comments at 1; Three Rivers Comments at 3.

reimbursement for the discounts that they provide to schools and libraries, *i.e.*, between receiving either a reimbursement for the discount or an off-set against their obligations to contribute to the universal service fund, the statute does not require that they be permitted to choose the method by which they provide those discounts to the school or library in the first place.<sup>76</sup>

47. In addition, we find that providing applicants with the right to choose which payment method to use will help to ensure that all schools and libraries have affordable access to telecommunications and Internet access services.<sup>77</sup> The Commission previously noted in the *Universal Service Order* that “requiring schools and libraries to pay in full could create serious cash flow problems for many schools and libraries and would disproportionately affect the most disadvantaged schools and libraries.”<sup>78</sup> The comments in the present record have confirmed that many applicants cannot afford to make the upfront payments that the BEAR method requires.<sup>79</sup> In light of the record before us, we conclude that the potential harm to schools and libraries from being required to make full payment upfront, if they are not prepared to, justifies giving applicants the choice of payment method.

48. As with any agreement, one way that applicants could memorialize the particular payment method chosen would be to place the agreement in the service agreement, or, where there is no written service contract, in a separate agreement.<sup>80</sup> Although applicants are not required to take such action, it has been suggested that doing so would decrease the number of customer complaints and strengthen the Administrator’s ability to take action for compliance failures.<sup>81</sup>

49. Once an applicant has made and memorialized its choice for a funding year, the applicant may not unilaterally shift from one form of payment to the other within that funding year.<sup>82</sup> Commenters argued that, in cases where the service begins before the Administrator makes its funding decision, applicants should be able to make discounted payments and then shift to BEAR payments after the funding decision is issued.<sup>83</sup> We find that the administrative costs of such a procedure exceed the limited benefits to the applicant.<sup>84</sup> Furthermore, service providers are under no obligation to provide discounts or reimbursements until a funding decision is approved, and we therefore find that it would be inappropriate to require providers to offer discounted service before any funding decision is made to authorize such discounts.

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<sup>76</sup> See 47 U.S.C. § 254(h)(1)(B); *Universal Service Order*, 12 FCC Rcd at 9085, para. 586.

<sup>77</sup> We note that the commenters said the current methodology imposes a financial and administrative burden on small schools and libraries. See, e.g., CCSSO Comments at 38, Montana PSC Comments at 4.

<sup>78</sup> See, e.g., CCSSO Comments at 41; *Universal Service Order*, 12 FCC Rcd at 9083, para. 586.

<sup>79</sup> See, e.g., Great City Comments at 3-4; Harris (Alabama DOE) Comments at 5; LAUSD Comments at 5; Maine PUC Comments at 6; Pennsylvania DOE Comments at 4.

<sup>80</sup> USAC Comments at 21.

<sup>81</sup> *Id.*

<sup>82</sup> See, e.g., Colorado DOE Comments at 7.

<sup>84</sup> A change in payment modality results in a change in the entity invoicing SLD. To protect program integrity, and ensure that the same services are not reimbursed twice, USAC would have to devote more resources to monitoring the invoices that it receives.

50. In response to service providers that argue that such a change will result in significant administrative costs to them, we reiterate that it is consistent with section 254 to provide applicants with the right to choose their payment method. Nevertheless, we anticipate that applicants and service providers will be able to work together in order to determine which payment method is most suitable. For example, a small carrier may enter into an agreement with a school district to provide telecommunications services. Under this contract, the payments could change from month to month based on usage. If the costs of instituting a new billing system to account for the changing levels of discounted service are significant, and the service provider is going to pass on the costs of such a system to the school district, the parties may find it more appropriate to negotiate a set discounted amount to be billed each month, with a true-up bill at the end of the contract.<sup>85</sup> In recognition, however, of potential changes to billing systems that some providers may need to undertake in order to allow any applicant to elect the BEAR process, this rule change concerning election of payment type will be effective for the start of Funding Year 2004.<sup>86</sup>

51. We also conclude that we should adopt a rule expressly requiring service providers to remit BEAR payments to the applicant within 20 days after receipt of such payments from the Administrator. BEAR payments are reimbursements for services that have already been provided to and paid for by a school or library. The structure of the schools and libraries support mechanism necessitates that reimbursement must flow to the applicant through the services provider.<sup>87</sup> BEAR payments are not the property of the service provider, which has been paid in full. The Administrator has received many complaints about service providers failing to remit the BEAR payments in a timely fashion or, in some cases, at all. According to the Administrator, formalizing the remittance requirement in a rule would strengthen its ability to ensure compliance.<sup>88</sup> The majority of commenters found that 20 days is an appropriate period for remittance.<sup>89</sup> We therefore adopt a rule requiring a provider who receives a BEAR check from the Administrator to remit payment to the applicant within 20 days of receipt. Because providers are already required to remit BEAR payments within a limited timeframe, and thus should not need to implement major billing system changes, this rule change, like other rule changes unless otherwise noted, will be effective upon publication in the Federal Register.

#### **D. Appeals Procedure**

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<sup>85</sup> We instruct the Administrator to work with the Bureau in order to develop procedures to implement such a mechanism at the appropriate time. We caution service providers and applicants that such agreements must be consistent with program rules and anticipate that parties would consider the possible costs and benefits of such agreements.

<sup>86</sup> See, e.g., Verizon Comments at 7-9.

<sup>87</sup> See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Dockets No. 96-45 and 97-21, Order, 15 FCC Rcd 7197 (1999).

<sup>88</sup> USAC Comments at 22.

<sup>89</sup> See, e.g., ALA Comments at 45; AASA Comments at 20; BellSouth/SBA Comments at 16; California DOE Comments at 3; Colorado DOE Comments at 7; Integrity Comments at 2; Intelenet Comments at 6; Iowa Comm. Net. Comments at 1; Kellogg Consulting Comments at 2; LAUSD Comments at 5; Marian High Comments at 1; Memphis City Schools Comments at 2; Michigan Comments at 14; Montana Comments at 4; NEA et al Comments at 17; Seattle PL Comments at 2; Software & Info Comments at 4; TAMSCO Comments at 3; TDI Comments at 10; Tel/Logic Comments at 13; Trillion Comments at 2; Verizon Comments at 10; Weisiger Comments at 27; WorldCom Comments at 11-12.

52. *Background* In this section we address several issues regarding the appeals procedure. First, in the *Eighth Order on Reconsideration*, the Commission established a process by which aggrieved parties could seek review from the Commission of decisions of the Administrator.<sup>90</sup> Under program rules, any party aggrieved by a decision of any Division of the Administrator may appeal the decision of a Division within 30 days of the date of the decision to the relevant Committee governing that Division. The time for filing an appeal with the Commission is tolled during the pendency of the appeal before the Committee.<sup>91</sup> Once the Committee has issued a decision on the appeal, the party then has up to 30 days to appeal that decision to the Commission.<sup>92</sup> Alternately, the party may file an appeal directly with the Commission within 30 days of the date of the issuance of the decision.<sup>93</sup> In either case, the 30-day time limit for filing an appeal commences on the date of the decision and runs until the filing of the appeal.<sup>94</sup> In each case, an appeal is deemed filed on the date that it is received, not the date it is postmarked.<sup>95</sup> Due to disruptions in the reliability of the mail service, however, we extended the appeal filing period on an emergency basis to 60 days for requests seeking review of decisions issued on or after August 13, 2001.<sup>96</sup>

53. In January 2002, the Commission created a new docket, CC Docket No. 02-6, to address issues relating to the schools and libraries program. This new docket, the schools and libraries universal support mechanism docket, was launched with the *Schools and Libraries NPRM*.<sup>97</sup> The development of this docket facilitates the review of material by Commission staff and outside parties because it isolates schools and libraries material from the extremely large general universal service fund dockets, CC 97-21 and CC 96-45.

54. In the *Schools and Libraries NPRM*, we sought comment on whether to amend our rules to extend permanently the time limit for filing an appeal with the Committee of the Schools and Libraries Division and the time limit for filing an appeal with the Commission from 30 to 60 days.<sup>98</sup> We also sought comment on whether we should treat appeals to the Administrator or to the Commission as having been received on the date they are postmarked rather than the date they are filed.<sup>99</sup> We noted that this change would depart from the Commission practice for filings in general, but would make the appeal procedure consistent with

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<sup>90</sup> *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Third Report and Order in CC Docket No. 97-21 and Fourth Order on Reconsideration in CC Docket No. 97-21 and Eighth Order on Reconsideration in CC Docket No. 96-45, 13 FCC Rcd 25058 (1998) ("*Eighth Order on Reconsideration*").

<sup>91</sup> 47 C.F.R. §§ 54.719(a), 54.720(b).

<sup>92</sup> 47 C.F.R. §§ 54.719(c), 54.720(a).

<sup>93</sup> 47 C.F.R. §§ 54.719(c), 54.720(a).

<sup>94</sup> 47 C.F.R. § 54.720.

<sup>95</sup> 47 C.F.R. § 54.720.

<sup>96</sup> See *Implementation of Interim Filing Procedures for Filings of Requests for Review, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, FCC 01-376 (rel. December 26, 2001; erratum rel. December 28, 2001; second erratum rel. January 4, 2002).

<sup>97</sup> *Schools and Libraries NPRM*.

<sup>98</sup> *Id.*, 17 FCC Rcd at 1935, paras. 51-52.

<sup>99</sup> *Id.*

the Administrator's practice of treating FCC Form 471 applications and other forms as having been filed as of the postmark date.<sup>100</sup>

55. *Deadline Extension* In the first four funding years of the school and libraries universal service support mechanism, twenty-two percent of all appeals to the Commission were dismissed as being untimely filed.<sup>101</sup> In addition, the Administrator states that eighteen percent of all appeals filed with the Administrator for Funding Year 2001 were dismissed as being outside of the 30-day period.<sup>102</sup> In light of this information, we sought comment on how to modify the current appeals procedures.

56. We agree with commenters that it is appropriate to increase the time limit for filing initial appeals with the Administrator and with the Commission to 60 days. Unlike many parties that typically practice before the Commission, many applicants in this program have no experience with regulatory filing processes. Thus the 30-day time period is often not adequate to allow potential petitioners to gather the documents and synthesize the arguments needed to file pleadings in order to challenge funding decisions. Commenters suggest that extending the filing period meets the goals of improving program operations and ensuring equitable distribution of benefits.<sup>103</sup> Commenters suggest that given schools' and libraries' unique resource limitations, the extension of time for filing appeals will also provide applicants an opportunity to review the relevant decision and determine whether there are valid bases for appeal.<sup>104</sup> We conclude that the time limit for filing an initial appeal with the Administrator and with the Commission should be extended to 60 days.<sup>105</sup> We therefore amend section 54.720(a)-(d) of our rules.<sup>106</sup>

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<sup>100</sup> *Id.*, see also 47 C.F.R. § 1.7 ("Unless otherwise provided in this title, by Public Notice, or by decision of the Commission or of the Commission's staff acting on delegated authority, pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission.")

<sup>101</sup> *Schools and Libraries NPRM*, 17 FCC Rcd at 1935, para. 51.

<sup>102</sup> See USAC Comments at 28.

<sup>103</sup> See, e.g., Great City Comments at 5 ("This rule change meets the goals of fairness, and by allowing applicants sufficient time to gather the necessary information and review the legitimacy of their appeals, may reduce the amount of trivial cases submitted to the Administrator"); MITS Comments at 8 ("In some instances, schools and libraries... did not even receive copies of funding commitment letters within 30 days of the decision. We therefore support increasing the time limit for appeals to 60 days...").

<sup>104</sup> See, e.g., GCI Comments at 9 ("Increasing the time limit for filing appeals to 60 days will allow applicants a greater opportunity to review their situation to determine if an appeal is appropriate"); Missouri Research and Education Network Comments at 10 ("Most applicants are neither telecommunications nor legal experts... Applicants do not want to file frivolous appeals, but without time to research the issue and understand the context in which a decision is made, it has been necessary to file appeals to maintain applicants' rights"); NC OIT Comments at 9 ("Non-substantive appeals only burden the program, artificially escalating administrative costs... Lengthening the appeals filing period should reduce the number of appeals").

<sup>105</sup> Parties should take note that the period for filing a petition for reconsideration is still 30 days, even if the petition seeks reconsideration of a decision on a request for review. The period for filing petitions for reconsideration is set in the Act, and cannot be altered by regulation. See 47 U.S.C. § 405(a).

<sup>106</sup> See Appendix B, Final Rules. In amending these rules, we make no distinction between appeals from decisions by the Schools and Libraries Division of USAC and appeals from other USAC divisions. Thus, the 60 day appeal period will apply to all USAC decisions. This is appropriate to avoid administrative complexity and confusion and because the other programs of USAC, such as the rural health care support mechanism, also involve parties that do not typically practice before the Commission.

57. Postmark We also agree with commenters that we should treat appeals to the Administrator or the Commission as having been received on the date that they are postmarked rather than the date they are filed. Commenters note that this change would be consistent with other program filing deadlines.<sup>107</sup> For example, such a change would make the appeal procedure consistent with the Administrator's practice of treating FCC Form 471 applications as having been filed as of the postmark date. In cases where a postmark is unclear or illegible, the Commission will require the applicant to submit a sworn affidavit stating the date that the appeal was mailed. Given this possibility, we continue to encourage parties to file appeals electronically, in order to ensure timely submission. In addition, we agree with commenters that using the postmarked date furthers the goals of improving program operation and ensuring a fair and equitable distribution of the benefits of the program.<sup>108</sup> Thus, we find that it is consistent with public interest that we treat appeals to the Administrator or the Commission as having been filed on the date they are postmarked. We therefore add a new section 54.720(e) to our rules.<sup>109</sup>

58. Docket Number Change We adopt a minor procedural amendment conforming our rules to reflect the change in docket numbers for filing appeals. Specifically, we change the wording of section 54.721, which describes the filing requirements for requests for reviews for the entire Universal Service program, to replace the last line of paragraph (a) as follows: instead of stating "and shall reference FCC Docket Nos. 97-21 and 96-45," the line shall read "and shall reference the applicable docket numbers."<sup>110</sup> The docket number for schools and libraries appeals is CC Docket No. 02-6, and the docket number for Rural Health Care support mechanism appeals is WC Docket No. 02-60. Petitioners should reference these docket numbers when filing pleadings with the FCC.

## E. Funding of Successful Appeals

59. Background Each funding year, the Administrator sets aside a portion of the funds available that year for the schools and libraries universal service mechanism to ensure that sufficient funds will be available for any appeals that may be granted by the Administrator or the Commission.<sup>111</sup> The Administrator calculates this reserve amount, in part, by generating a prediction of the percentage of its decisions that will be reversed based on historical experience. Because the prediction may underestimate the actual number of reversed decisions, it is possible that the appeal reserve fund in a particular year will ultimately be inadequate to fund all

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<sup>107</sup> See, e.g., Alaska Comments at 9, CSSOC Comments at 49, Illinois BOE Comments at 24, NC OIT Comments at 9 ("[S]ince almost every other E-Rate deadline has been based on the postmarked date... some applicants have been confused about the differing deadlines for appeals.").

<sup>108</sup> See, e.g., EdLiNC Comments at 16 ("It is more equitable to isolated communities that may need to build in extra mail time or use funds to pay for express shipping that guarantees delivery"); E-rate Elite Comments at 7 (The current procedure subjects the applicant to a multitude of circumstances including prompt delivery by the chosen delivery carrier. It also prevents the applicant from obtaining any documentation that would be used to support that appeal as timely filed).

<sup>109</sup> See Appendix B.

<sup>110</sup> *Id.*

<sup>111</sup> *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, Fifth Order on Reconsideration in CC Docket No. 97-21, *Federal-State Joint Board on Universal Service*, Eleventh Order on Reconsideration in CC Docket No. 96-45, and Further Notice of Proposed Rulemaking, 14 FCC Rcd 6033, n.15 (1999) (*Eleventh Reconsideration Order and Further Notice*).

successful appeals in that year, although this has not happened to date.

60. In the *Eleventh Reconsideration Order and Further Notice*, the Commission proposed certain rules establishing funding priorities for the Administrator to apply when distributing funds from the appeal reserve to schools and libraries that successfully appeal decisions of the Administrator.<sup>112</sup> Specifically, the Commission proposed that the Administrator should first fund all Priority One appeals, and then allocate any remaining funds in the appeal reserve to Priority Two appeals in order of descending discount rate.<sup>113</sup> The Commission further proposed that if funds were not available for all Priority One appeals, then all funding should be allocated to Priority One appeals on a pro-rata basis.<sup>114</sup> To ensure correct distribution of funds to Priority One appeals, the Commission proposed that the Administrator should wait until a final decision has been issued on all Priority One service appeals before allocating funds to such services on a pro-rata basis.<sup>115</sup>

61. In the *Schools and Libraries NPRM*, we sought further comment on the funding of successful appeals.<sup>116</sup> Specifically, we asked whether, instead of adopting the proposal set forth in the *Eleventh Reconsideration Order and Further Notice*, we should fully fund successful appeals to the same extent that they would have been funded in the ordinary application process. We also sought comment on the source of funding in the unlikely event that the funds allocated for successful appeals were not sufficient to fund all such successful appeals.<sup>117</sup> We asked for comment on what effect funding of successful appeals in the face of a depleted appeals reserve would have on the Administrator's allocation of schools and library funds to according Priority One and Priority Two requests.

62. *Discussion* Based on the record, we conclude that all successful appeals should be awarded discounts to the extent they would have been had the discounts been awarded through the normal funding process. We further conclude that the Administrator should not wait to grant post-appeal funding until all appeals have been decided, but should instead fund applications if and when they are granted. We further find it appropriate to adopt a rule that authorizes using funds budgeted for future funding years, if the Administrator-set appeals reserve is inadequate to award discounts to all successful appeals.<sup>118</sup> We recognize that utilizing such funds will reduce the total amount of funding available in subsequent funding years. However, we believe that this result is necessary in order to assure that no applicants are prejudiced because they were awarded discounts through the appeal process rather than through the initial application process.

63. The few commenters that addressed the use of funding from future years were

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<sup>112</sup> See, generally, *Eleventh Reconsideration Order and Further Notice*, 14 FCC Rcd at 6037-38, paras. 9-12.

<sup>113</sup> *Id.*, 14 FCC Rcd at 6037, para. 9.

<sup>114</sup> *Id.*, 14 FCC Rcd at 6038, para. 10.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*, 17 FCC Rcd at 1936, para. 55.

<sup>117</sup> *Id.*, para. 56.

<sup>118</sup> We note that, due to careful and cautious calculations, the Administrator has never exhausted the appeals reserve. However, given the importance of funding all meritorious appeals, it is appropriate to be prepared should we ever be faced with those circumstances.

mixed in their assessment.<sup>119</sup> In particular, we disagree with commenters such as the Council of Chief State School Officers, who state that using funding budgeted for future years would penalize applicants in the next funding year.<sup>120</sup> We conclude that the inequity of failing to award discounts for a timely appeal far outweighs the impact granting such appeals would have in reducing the overall available funding in future funding years. Indeed, any modest reduction in the total amount of funds budgeted for future funding years is equally distributed among all successful applicants. In contrast, the alternative imposes any shortfall on an individual applicant, who, after successfully appealing, has done nothing to merit the denial of funding. In balancing these outcomes, we conclude the more equitable solution is to spread the impact by using funds budgeted for future funding years, should the appeal reserve be exhausted. Consequently, we adopt a rule that authorizes USAC to use funds budgeted from subsequent funding years to fund discounts for successful appeals in the unlikely case that the appeals reserve is exhausted.

#### F. Suspension and Debarment

64. *Background* Since the inception of the schools and libraries support mechanism, the Commission and the Administrator have worked to strengthen and develop measures to eliminate the potential for waste, fraud, and abuse so that schools and libraries are able to benefit from the discounts provided for under section 254. It is important that the application and disbursement process be as streamlined and straightforward as possible for participants. At the same time, it is vital to the integrity of the program that there are sufficient procedural safeguards to ensure accountability.

65. In the *Schools and Libraries NPRM*, the Commission observed that the Administrator has exercised its existing authority to combat waste, fraud, and abuse.<sup>121</sup> It is essential, however, that we continue to improve our efforts. Thus, in the *Schools and Libraries NPRM*, the Commission sought comment on various possible approaches to limit waste, fraud, and abuse.<sup>122</sup> It noted that while section 503(b) of the Act permits us to initiate forfeiture proceedings against those that willfully or repeatedly fail to comply with statutory and regulatory requirements, there are no provisions in the rules to bar such entities or individuals from participating in the program.<sup>123</sup> The Commission sought comment on whether to adopt rules barring applicants, service providers, and others (such as consultants) that willfully or repeatedly fail to comply with program rules from involvement with the program for a period of years. The Commission asked for comment on, for example, standards for barring such entities, the

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<sup>119</sup> See NEA et al Comments at 25, NYBOE Comments at 8, New York State Education Department Comments at 3, Software & Info Comments at 5, SVETN Comments at 2, Tel/Logic Comments at 16 (endorsing the idea of borrowing from future funding years to fund successful appeals); but see Arkansas E-rate Comments at 6, California DOE Comments at 5, CCSSO Comments at 50, Memphis City Schools Comments at 3, MOREnet Comments at 11, NC OIT Comments at 10, Weisiger Comments at 33 (opposing borrowing funds from a future funding year).

<sup>120</sup> CCSSO Comments at 51.

<sup>121</sup> *Schools and Libraries NPRM*, 17 FCC Rcd at 1937, para. 58.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1937-38, para. 60 (citing section 503(b) of the Act, which provides for forfeitures in the case of any person who "willfully or repeatedly failed to comply with any of the provisions of this Act or any rule, regulation, or Order issued by the Commission under this Act . . ." 47 U.S.C. § 503(b)(1)(B)).

appropriate period of debarment, and whether the debarment might apply to individuals.

66. *Discussion* We agree with the majority of commenters that we should adopt rules to prevent bad actors from receiving the benefits associated with the schools and libraries support mechanism.<sup>124</sup> By prohibiting bad actors from involvement with the schools and libraries support mechanism, we will deter waste, fraud, and abuse, thus helping to ensure that support is used for schools' and libraries' access to advanced telecommunications and information services consistent with section 254.<sup>125</sup> It is not our intention to use this debarment to punish. Rather, debarring applicants, service providers, consultants, or others that have defrauded the government or engaged in similar acts through activities associated with or related to the schools and libraries support mechanism is necessary to protect the integrity of the program. We conclude that these debarment procedures are prudent and consistent with our goal of ensuring that the universal service support mechanisms operate without waste, fraud, or abuse.<sup>126</sup>

67. We conclude that persons convicted of criminal violations or held civilly liable for certain acts arising from their participation in the schools and libraries support mechanism shall be debarred from activities associated with or related to the schools and libraries support mechanism for a specified period, absent extraordinary circumstances.<sup>127</sup> The debarment rules we adopt are informed by the nonprocurement debarment regulations for federal agencies, which do not apply to independent agencies such as the Commission.<sup>128</sup> Specifically, we find that persons convicted of, or held civilly liable for, the attempt or commission of criminal fraud, theft, embezzlement, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice, or other fraud or criminal offense arising out of activities associated with or related to the schools and libraries universal service support mechanism shall be debarred from involvement with the schools and libraries support mechanism for a period of three years.<sup>129</sup> Where circumstances warrant, a longer period of debarment may be imposed if the extension is necessary to protect the public interest. In the case of multiple convictions or judgments, the Commission shall determine based

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<sup>124</sup> See, e.g., Alabama Department of Education Comments at 5; ALA Comments at 44; BellSouth Comments at 37; CCSSO Comments at 54; EdLiNC Comments at 15; Erate Elite Comments at 11; Excaliber Comments at 2; Funds For Learning Comments at 26; Integrity Comments at 4-5; Kellogg Consulting Comments at 3; Kentucky Department of Education Comments at 2; LA Unified School District Comments at 8; Memphis Comments at 3; Montana Comments at 7; NY PL Comments at 7; TelLogic Comments at 21; New York Comments at 14; USAC Comments at 31-33.

<sup>125</sup> See 47 U.S.C. § 254(b)(6) and (h)(1)(B)(2).

<sup>126</sup> 47 U.S.C. § 254.

<sup>127</sup> Although there may be extraordinary circumstances not foreseeable at this time in which a person convicted of, or held civilly liable for, the specified actions should not be debarred, we anticipate that this burden will not often be met.

<sup>128</sup> See, e.g., 28 C.F.R. § 67.100 *et seq.* (Department of Justice rules implementing governmentwide rules); 28 C.F.R. § 67.105 (noting inapplicability of rules to independent agencies). This approach was recommended by the Administrator in its comments during this proceeding. See USAC Comments at 32-33 (referring to Department of Justice rules). We note that changes to the existing federal agency debarment rules were proposed early in 2002. See Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants), Proposed Rule, 67 Fed. Reg. 3266 (2002).

<sup>129</sup> The time period of three years is consistent with the governmentwide rules regarding debarment. See, e.g., 28 C.F.R. § 67.320(a)(1).

on the facts before it whether debarments shall run concurrently or consecutively.

68. A person subject to debarment, or a person that has contracted or intends to contract with a person subject to debarment to provide or receive services in connection with the schools and libraries support mechanism, may file arguments in writing and supported by documentation in opposition to the proposed debarment action or supporting a reduction in the period or scope of debarment. The Commission shall consider any such request, and may, upon the filing of arguments against the proposed suspension or debarment by an interested party or on its own motion, grant such a request for extraordinary circumstances. For example, reversal of the conviction or civil judgment upon which the debarment was based shall constitute extraordinary circumstances.<sup>130</sup>

69. In light of the serious nature of a conviction or civil judgment relating to participation in the support mechanism, upon becoming aware of a person's criminal conviction or civil judgment under the specified circumstances, the Commission shall suspend the person from activities associated with or related to the schools and libraries support mechanism.<sup>131</sup> Suspension is an immediate but temporary measure pending a final determination of debarment. Suspension will help to ensure that a person that has been convicted or held civilly liable for behavior with respect to the schools and libraries support mechanism cannot continue to benefit from the mechanism pending resolution of the debarment process. The Commission shall send notice to the person's last known address by certified mail, return receipt requested, and shall publish notice in the Federal Register. Suspension is effective immediately upon the earlier of the person's receipt of such notice or publication in the Federal Register.

70. The notice of suspension shall include notice of debarment proceedings. Such notice shall (1) give the reasons for the proposed debarment in terms sufficient to put the person on notice of the conduct or transaction(s) upon which it is based and the cause relied upon, namely, the entry of a criminal conviction or civil judgment; (2) explain the applicable debarment procedures; (3) describe the potential effect of debarment.<sup>132</sup> A person subject to debarment or a person that has contracted or intends to contract with a person subject to debarment to provide or receive services in connection with the schools and libraries support mechanism, that elects to file arguments in opposition to the suspension and proposed debarment, must do so with any relevant documentation within 30 days after receiving notice or publication in the Federal Register, whichever is earlier. Any suspended person or person who has contracted or intends to contract with a suspended person also may request, in writing and supported by documentation, reversal of the suspension action or a reduction in the period or scope of suspension. The Commission shall consider such a request, but such action will not ordinarily be granted. Within 90 days of receipt of any such request, the Commission, in the absence of extraordinary circumstances, shall provide the person prompt notice of the decision to debar, and shall publish the decision in the Federal Register. Debarment shall be effective upon the earlier of receipt of notification or publication in the Federal Register.

71. Consistent with the federal agency regulations, we define "person" as "[a]ny

<sup>130</sup> See, e.g., 28 C.F.R. § 67.320.

<sup>131</sup> See, e.g., 28 C.F.R. § 67.400.

<sup>132</sup> See, e.g., 28 C.F.R. § 67.312.

individual, corporation, partnership, association, unit of government or legal entity, however organized.”<sup>133</sup> Under this definition, persons may include applicants, service providers, consultants, or others engaged in activities associated with or related to the support mechanism.

72. Consistent with the federal agency regulations, suspension or debarment of a corporation, partnership, association, unit of government or legal entity, however organized, defined as a “person” under these regulations, constitutes suspension or debarment of all its divisions and other organizational elements from all activities associated with or related to the schools and libraries support mechanism for the debarment period, unless the suspension or debarment decision is limited by its terms to one or more specifically identified individuals, divisions, or other organizational elements or to specific types of transactions.<sup>134</sup>

73. Consistent with the federal agency regulations, we define “conviction” as “a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere” and “civil liability” or “civilly liable” as “the disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement with admission of liability, stipulation, or otherwise creating a civil liability for the wrongful acts complained of, or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. §§ 3801-12).”<sup>135</sup> We further conclude that, for purposes of these rules, “activities associated with or related to the schools and libraries support mechanism” include the receipt of funds or discounted services through the schools and libraries support mechanism, or consulting with, assisting, or advising applicants or service providers regarding the schools and libraries support mechanism.

74. A conviction or civil judgment in the specified circumstances therefore automatically results in suspension and the initiation of debarment proceedings, providing a clear and stringent response on the part of the Commission and serving to deter waste, fraud, and abuse in the program. Although the governmentwide rules provide that agencies “may” debar or suspend persons convicted or held civilly liable, we conclude that a rule requiring the Commission to suspend and debar such persons absent extraordinary circumstances will better serve the Commission’s goal of limiting waste, fraud, and abuse. In light of our statutory obligation to preserve and advance universal service, we believe it appropriate to set a very high threshold for parties seeking to persuade us that debarment is not warranted in circumstances where a court of competent jurisdiction has concluded that person has committed some form of fraud related to the schools and libraries program. We conclude that under our rules the Commission shall debar persons convicted or held civilly liable after immediate suspension, absent extraordinary circumstances. These automatic actions in the clear circumstances where legal proceedings have concluded with due process are an appropriate and prudent means of maintaining the integrity of the schools and libraries support mechanism.

75. We recognize that where a service provider is debarred, an applicant relying on

<sup>133</sup> See, e.g., 28 C.F.R. § 67.105. The definition in the federal agency rules also provides an exception for various foreign entities, but those distinctions are not germane to the schools and libraries support mechanism because of its existing eligibility rules.

<sup>134</sup> *Id.* For example, if Company X and its President were each charged or sued, but only the President was convicted or found civilly liable, only the President would be debarred.

<sup>135</sup> *Id.*

that service provider for discounted services may need to change service providers for that funding year in order to continue to receive the benefits of the support mechanism. Under existing USAC procedures, after an application has been approved and before the last day for invoicing, an applicant may change its service provider.<sup>136</sup> Consistent with these procedures, therefore, applicants whose service providers have been debarred after an application has been approved may change service providers for that funding year.<sup>137</sup>

76. The Enforcement Bureau shall undertake suspension and debarment proceedings under this section. The Wireline Competition Bureau shall make any necessary changes to FCC forms, including a notification that a person convicted of or held civilly liable for the conduct specified above shall be suspended and debarred absent extraordinary circumstances. We also direct the Wireline Competition Bureau to oversee the implementation and coordination of debarment procedures and policies with the Administrator, including, but not limited to, the publication and maintenance of a list on the Administrator's web site of persons suspended or debarred from the program. We direct the Wireline Competition Bureau to ensure that the Administrator implements procedures to ensure that any person who has been suspended or debarred not benefit from the schools and libraries support mechanism for the specified period of time.

77. These rules constitute an important step in continuing to ensure program integrity. We are committed to considering other deliberate and appropriate measures in order to provide for compliance with statutory requirements and our rules, thereby ensuring that the benefits of this universal service support mechanism are available to the largest number of schools and libraries on an equitable basis. In the accompanying Further Notice, we seek further comment on whether to debar persons in other circumstances and related issues.<sup>138</sup>

### G. Utilization of Unused Funds

78. *Background* In the *Schools and Libraries NPRM*, we sought comment on what to do with undisbursed funds, to the extent that they remain despite our reduction efforts.<sup>139</sup> This question was addressed recently in the *First Order* in this docket.<sup>140</sup> We also sought comment to develop a record on the reasons why applicants may fail to fully use committed funds under the

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<sup>136</sup> See < <http://www.sl.universalservice.org/reference/OperationalSpin.asp>>. In particular, applicants may make operational Service Provider Indicator Number (SPIN) changes when an applicant certifies that (1) the SPIN change is allowed under its state and local procurement rules, (2) the SPIN change is allowable under the terms of any contract between the applicant and its original service provider, and (3) the applicant has notified its original service provider of its intent to change service providers. *Id.*

<sup>137</sup> Current procedures, however, do not permit applicants to change service providers prior to approval of an application or after the last date for invoices. *Id.* In the Further Notice, we seek comment on how to treat applicants whose service providers have been debarred prior to action on the application. We also seek comment on whether we should prohibit applicants who have been complicit in the actions of a debarred service provider from changing service providers in that funding year, and how such complicity should be defined. We note that to the extent that it is determined that the debarred company's assistance is temporarily necessary to enable transition to another company's services, the Commission may direct such assistance.

<sup>138</sup> See *infra* para. 102.

<sup>139</sup> *Schools and Libraries NPRM*, 17 FCC Rcd at 1940-1941, paras. 69-70.

<sup>140</sup> See *First Order*.

program.<sup>141</sup> In addition, we sought comment on whether there are modifications to the application and funding disbursement process that would reduce the level of unused funds in each funding year.<sup>142</sup>

79. *Discussion* We decline, at this time, to adopt additional measures to reduce unused funds. The *First Order* adopted a framework for the treatment of unused funds from the schools and libraries universal service support mechanism.<sup>143</sup> In that Order, we determined that it was in the public interest to take immediate action to stabilize the contribution factor, and that beginning no later than the second quarter of 2003, any unused funds from the schools and libraries support mechanism shall, consistent with the public interest, be carried forward for disbursement in subsequent funding years of the schools and libraries support mechanism.<sup>144</sup>

80. As noted below, the Administrator has taken certain measures that will also address the issue of unused funds from the schools and libraries program.<sup>145</sup> We find that these changes will help improve the disbursement of program funds. In addition, we continue to explore procedural and programmatic changes to the schools and libraries support mechanism that may help reduce the amount of funds that are not disbursed. We find that such actions will help us to most effectively implement the goals of section 254 of the Act.

81. Commenters noted that during the application process, applicants have difficulty predicting needs, usage, and non-contracted rates. Therefore, applicants may apply for more funding than is actually needed.<sup>146</sup> Commenters also cited certain factors beyond the program's control that contribute to unclaimed funds.<sup>147</sup> Indeed, the Administrator and the Commission are aware of these issues. In an effort to reduce the amount of unused funds, starting with Funding Year 2001, the Administrator is issuing funding commitments slightly in excess of the \$2.25 billion funding cap.<sup>148</sup> The Administrator reports that as of October 28, 2002, it had committed approximately \$2.257 billion for Funding Year 2001.<sup>149</sup> Specifically, the Administrator is basing overcommitments on past levels of unused funds, allowing a margin for error.

82. Commenters also state that some committed funds go unused because of late funding commitment decisions.<sup>150</sup> We agree with commenters that receiving funding

<sup>141</sup> See *Schools and Libraries NPRM*, 17 FCC Rcd at 1940, para. 68.

<sup>142</sup> *Id.*

<sup>143</sup> *First Order*.

<sup>144</sup> *First Order*, 17 FCC Rcd at 11523-11524, para. 3.

<sup>145</sup> See *infra* para. 83.

<sup>146</sup> See, e.g., Alaska Comments at 14, BellSouth/SBA Comments at 40, Colorado DOE Comments at 10-11, CCSSO Comments at 59-62.

<sup>147</sup> Some of the factors listed by commenters include changes in technology (see, e.g., Bakersfield SD Comments at 2, EdLINC Comments at 5, West Virginia DOE Comments at 7); changes in the amount of funding from other sources and organizational issues, such as staff turnover (See, e.g., Kellogg Consulting Comments at 3-4, Pennsylvania DOE Comments at 10).

<sup>148</sup> See *Schools and Libraries NPRM*, 17 FCC Rcd at 1939, para. 67.

<sup>149</sup> See SLD website, Cumulative National Data – Funding Year 2001, <<http://www.sl.universalservice.org/funding/y4/national.asp>>.

<sup>150</sup> See, e.g., Funds for Learning Comments at 27.

commitment decisions earlier in the process would help reduce the amount of unused funds. The Administrator has continued to improve its processing. An increasing percentage of applicants now receive funding decisions earlier in the funding cycle.<sup>151</sup> In addition, the Administrator has created a new website where the public, applicants and providers, can view funding commitment data the day after it is released, rather than having to wait for the delivery of funding letters.<sup>152</sup> We believe that each of these changes will help prevent the likelihood of waste by improving the disbursement of program funds.

83. In addition, several commenters noted that there is no incentive for applicants to turn committed funds back to USAC when an applicant realizes that it will not use the full committed amount.<sup>153</sup> Some commenters also stated that the Form 500, which applicants may use to notify the Administrator that committed funds are no longer required, is an ineffective tool for commitment cancellation.<sup>154</sup> The form is still a relatively new addition to the program. At this time, we do not believe that it is appropriate or necessary to change the Form 500. As with all aspects of the program, should the Administrator have recommendations about how to improve the Form 500 or related processes, the Administrator will bring these issues to our attention. We trust that as applicants become more familiar with the form and are better able to judge their funding supply through data newly provided on the Administrator's website, applicants will inform the Administrator when they will not fully use committed funds.

#### H. Conforming Rule Changes

84. *Background* Under the Act, only eligible schools and libraries may receive universal service funds under the schools and libraries universal service mechanism.<sup>155</sup> To be eligible, a school must, among other things, meet the statutory definition of "elementary school" or "secondary school" contained in section 254(h)(7) of the Act.<sup>156</sup> Section 254(h)(7) provides that the terms "elementary school" and "secondary school" mean elementary schools and secondary schools as defined in paragraphs (14) and (25) of section 14101 of the Elementary and Secondary Education Act of 1965 (Education Act), as codified at 20 U.S.C. § 8801(14) and 8801(25), respectively.<sup>157</sup>

85. At the time that section 254 was added to the Act, an elementary school was defined at 20 U.S.C. § 8801(14) as "a nonprofit institutional day or residential school that

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<sup>151</sup> See *infra* note 179.

<sup>152</sup> See SLD website, Funding Request Data Retrieval Instructions, <<http://www.sl.universalservice.org/funding/OpenDataSearch>>.

<sup>153</sup> See, e.g., Bell South Comments, E-Rate Elite Comments at 12; Iowa Communications Network Comments at 2; Iowa DOE Comments at 11; Michigan Comments at 26 (Comments supported by letters from Merit Networks, Inc., State of Michigan Department of Education, and State of Michigan Department of History, Arts and Libraries); York County Library Comments at 15-16.

<sup>154</sup> See, e.g., BellSouth/SBA Comments at 40; Iowa Communications Network Comments at 2; Iowa DOE Comments at 11.

<sup>155</sup> 47 C.F.R. § 54.501; see *Universal Service Order*, 12 FCC Rcd at 9066, para. 522.

<sup>156</sup> 47 U.S.C. § 254(h)(7)(A).

<sup>157</sup> *Id.*

provides elementary education, as determined under State law.”<sup>158</sup> A secondary school was defined at 20 U.S.C. § 8801(25) as “a nonprofit institutional day or residential school that provides secondary education, as determined under State law, except that such term does not include any education beyond grade 12.”<sup>159</sup> In the *Universal Service Order*, the Commission concluded that all schools that fall within the definition contained in the Elementary and Secondary Education Act of 1965 and that meet the other criteria for eligibility established in section 254 should be eligible.<sup>160</sup> Thus, the Commission’s rules implementing section 254 directly reflected the statutory definitions in the Education Act, defining elementary school as “a nonprofit institutional day or residential school that provides elementary education, as determined under State law” and stating that a secondary school was “a non-profit institutional day or residential school that provides secondary education, as determined under State law,” but that “[a] secondary school does not offer education beyond grade 12.”<sup>161</sup> The Commission further provided expressly that “[o]nly schools meeting the statutory definitions of ‘elementary school,’ as defined in 20 U.S.C. 8801(14), or ‘secondary school,’ as defined in 20 U.S.C. 8801(25) . . . shall be eligible for discounts on telecommunications and other supported services under this subpart.”<sup>162</sup>

86. Following the Commission’s implementation of section 254, Congress made certain statutory changes to the definitions of “elementary school” and “secondary school” in the Education Act, most recently in the No Child Left Behind Act of 2001.<sup>163</sup> Currently, the Education Act defines “elementary school” as “a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law,” and “secondary school” as “a non-profit institutional day or residential school, including a public secondary charter school, that provides secondary education, as determined under State law.”<sup>164</sup> The definitions for elementary school and secondary school have also been moved to 20 U.S.C. § 7801(18) and 7801(38), respectively.<sup>165</sup>

87. *Discussion* We adopt minor changes to our rules to conform our definitions of eligible schools to the current definitions of and citations for “elementary school” and “secondary school” following the passage of the No Child Left Behind Act. First, we amend the definition of elementary school at section 54.500(b) by adding, after “residential school,” the phrase “including a public elementary charter school,” and the definition of secondary school at section 54.500(j) by adding, after “residential school,” the phrase “including a public secondary

<sup>158</sup> See 20 U.S.C. § 8801, as added, Improving America’s Schools Act of 1994, Section 14101, Pub. L. 103-382, Title I, § 101, October 20, 1994, 108 Stat. 3887.

<sup>159</sup> *Id.*

<sup>160</sup> *Universal Service Order*, 12 FCC Rcd at 9068, para. 554

<sup>161</sup> 47 C.F.R. §§ 54.500(b), 54.500(j).

<sup>162</sup> 47 C.F.R. § 54.501(b)(1).

<sup>163</sup> See The No Child Left Behind Act, Pub. L. 107-110, § 901, 115 Stat. 1425, 1956 (Jan. 8, 2002) (codified at 20 U.S.C. §§ 7801(18), (38)), Pub. L. 106- 554, § 1606(a), 114 Stat. 2763, 2763A-334 (Dec. 21, 2000) (redesignating paragraphs (15) through (29) as paragraphs (16) through (30), respectively; Charter School Expansion Act of 1998, Pub. L. 105-278, § 3(j), 112 Stat. 2688 (Oct. 22, 1998).

<sup>164</sup> 20 U.S.C. §§ 7801(18) (emphasis added), 7801(38) (emphasis added).

<sup>165</sup> *Id.*

charter school.”<sup>166</sup>

88. In so doing, we are not expanding the scope of either definition because public elementary and secondary charter schools were already eligible under the original definitions. Under these definitions, the Commission looked to applicable State law to determine which entities qualified as public elementary and secondary schools.<sup>167</sup> Thus, where applicable State laws provided for public elementary and secondary charter schools, such schools were eligible for discounts under the old definition. The regulatory change merely makes this eligibility explicit.

89. Second, we amend section 54.501(b)(1) of our rules, to reflect the new citations for the elementary school and secondary school definitions following the passage of the No Child Left Behind Act.<sup>168</sup> Specifically, we replace the citations to 20 U.S.C. § 8801(14) and 8801(25) with citations to 20 U.S.C. §§ 7801(18) and 7801(38), respectively.<sup>169</sup> Because the new provisions are substantively the same as the original definitions, we conclude that all of these rule changes are minor and technical, and we therefore find good cause to conclude that notice and comment procedures of the Administrative Procedure Act (APA) are unnecessary.<sup>170</sup>

#### I. Deletion of Obsolete Rules

90. The Biennial Regulatory Review 2000 Staff Report (Staff Report) recommended that sections 54.701(b) through (e) of our rules, which mandate the merger of the Schools and Libraries Corporation and the Rural Health Care Corporation into the Universal Service Administrative Company, be deleted.<sup>171</sup> Given that the merger has been completed, the Staff Report concluded that these transitional provisions were no longer applicable.<sup>172</sup> We now adopt the recommendations of the Staff Report and delete section 54.701(b) through (e), and renumber current provisions 54.701(f) through (h) as 54.701(b) through (d). Again, because the rule sections in question are now obsolete, we conclude that these rule changes are minor and technical, and we therefore find good cause to conclude that notice and comment under the APA is not necessary.

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<sup>166</sup> See Appendix B.

<sup>167</sup> *Request for Review by Arkansas Department of Correction, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-177074, CC Dockets No. 96-45 and 97-21, Order, 17 FCC Rcd 7100, para. 2 (Wireline Comp. Bur. 2002).

<sup>168</sup> See Appendix B.

<sup>169</sup> *Id.*

<sup>170</sup> See 5 U.S.C. § 553(b)(3)(B) (providing that notice and comment are not required “when the agency for good cause feels (and incorporates the finding and a brief statement therefore in the rules issued) that notice and public procedures thereon are impractical, unnecessary or contrary to the public interest.”).

<sup>171</sup> See Federal Communications Commission Biennial Regulatory Review 2000, Staff Report, September 18, 2000 (Staff Report) at 88, <<http://www.fcc.gov/Reports/biennial2000report.pdf>>.

<sup>172</sup> *Id.*

#### IV. FURTHER NOTICE OF PROPOSED RULEMAKING

##### A. Background

91. In the *First Order*, we determined that unused funds from the schools and libraries mechanism should be used to stabilize the contribution factor while the Commission considers whether and how to reform its methodology for contributions to the universal service support mechanism. We also determined that beginning no later than the second quarter of 2003, which began April 1, 2003, unused funds shall be carried forward for disbursement in subsequent funding years of the schools and libraries mechanism. Accordingly, in this *Further Notice* we seek comment on proposed rules regarding the carryover of unused funds from funding year to funding year of the schools and libraries support mechanism.

92. We also seek comment on several other matters relevant to the schools and libraries mechanism. We seek comment regarding our rules pertaining to when applicants file a technology plan. We seek further comment on the establishment of an online computerized eligible services list for telecommunications services and Internet access. Finally, we seek comment on additional measures to limit waste, fraud, and abuse.

##### B. Proposed Unused Funds Carryover Rules

93. In this *Further Notice*, we propose specific rules implementing the Commission's decision to carry forward unused funds for use in subsequent funding years of the schools and libraries program.<sup>173</sup> In general, we propose to amend our rules to require USAC to provide quarterly estimates to the Commission regarding the amount of unused funds that will be available to be carried forward.<sup>174</sup> We further propose to amend our rules so that the Commission would carry forward available unused funds from prior years on an annual basis for use in the following full funding year of the schools and libraries program.<sup>175</sup> We seek comment on the proposed rules and our proposed procedures implementing these rules.

94. We propose that on a quarterly basis, USAC, after consultation with the Schools and Libraries Committee, provide the Commission with an estimate of unused funds from the schools and libraries support mechanism for each of the prior funding years.<sup>176</sup> By providing quarterly estimates of unused funds, we would establish a regular reporting cycle for USAC. In addition, quarterly estimates would provide schools and libraries with general notice regarding the amount of unused funds that may be made available for use in the subsequent funding year. We seek comment on this proposal.

95. We propose that USAC's estimate of unused funds for a particular funding year generally total the difference between the amount of funds collected, or made available for that particular funding year, and the amount of funds disbursed or to be disbursed. We expect that

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<sup>173</sup> See Appendix C.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> We note that USAC estimated unused funds from the schools and libraries support mechanism in prior quarterly submissions to the Commission. See, e.g., *Proposed First Quarter 2000 Universal Service Contribution Factors and Proposed Actions*, CC Docket No. 96-45, Public Notice, DA 99-2780 (rel. Dec. 10, 1999).

USAC's estimates will become more refined as a particular funding year progresses, given its unique skills and experience administering the schools and libraries mechanism. We seek comment on this proposal.

96. In addition, we propose that in the second quarter of each calendar year, the Commission will announce a specific amount of unused funds from prior funding years to be carried forward in accordance with the public interest for use in the next full funding year, in excess of the annual funding cap.<sup>177</sup> For example, unused funds as of second quarter 2004 would be carried forward for use in the Schools and Libraries Funding Year 2004.<sup>178</sup> Carrying forward unused funds in the second quarter of the calendar year would coincide with the time of year the SLD makes funding commitment decisions, which typically occurs in the second and third quarters of the calendar year.<sup>179</sup> Once added, the funding year would continue to operate normally, with the benefit of any additional unused funds. We believe that this will ensure minimal disruption of the administration of the schools and libraries program.

97. We also propose that after unused funds are identified and carried forward in the second quarter of the calendar year, USAC will begin to re-calculate unused funds, beginning with unused funds as of the third quarter of the calendar year. Such funds would be carried forward to the next full funding year. As a result, we believe that the above-described rolling methodology will provide certainty regarding when unused funds will be carried forward for use in the schools and libraries program. In addition, the proposed rules would ensure that schools and libraries have reasonable notice from the quarterly estimates of the approximate amount of funds that we expect to become available in the second quarter of the calendar year. In general, schools and libraries submit applications for funding between November and January, preceding the start of the funding year.<sup>180</sup> Under our proposal, applicants would have the benefit of three quarterly estimates of unused funds before the filing window closes, and would be able to structure their applications appropriately. We seek comment regarding this proposal.

98. Further, we propose that USAC begin estimating unused funds from the schools and libraries mechanism in 2003, and that unused funds would be carried forward in accordance with the public interest for use in Funding Year 2004 of the schools and libraries program. In the *First Order*, the Commission determined that it would begin to carry forward unused funds from the schools and libraries program no later than second quarter 2003.<sup>181</sup> We seek comment regarding this proposal.

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<sup>177</sup> The annual funding cap on federal universal service support for schools and libraries is currently \$2.25 billion. See 47 C.F.R. § 54.507(a). A calendar year, for example, commences on January 1 and ends on December 31.

<sup>178</sup> See 47 C.F.R. § 54.507(b) ("A funding year for purposes of the schools and libraries cap shall be the period July 1 through June 30."). Funding years are described by the year in which the funding period starts. For example, the funding period which begins on July 1, 2003 and ends on June 30, 2004, is called Funding Year 2003. The funding period which begins on July 1, 2004 and ends on June 30, 2005, is called Funding Year 2004.

<sup>179</sup> Applicants learn about their funding commitments via a Funding Commitment Decision Letter. SLD issues these letters in "waves" which are released every other week. For Funding Year 2001, the first wave of letters was released on July 23, 2001. For Funding Year 2002, the first wave of letters was released on April 24, 2002.

<sup>180</sup> See SLD website, E-Rate Discounts for Schools and Libraries: E-Rate Timetable and List of Deadlines, <<http://www.sl.universalservice.org/overview/duedates.asp>>.

<sup>181</sup> *First Order*, 17 FCC Rcd at 11524, para. 3.

### C. Technology Plan

99. To ensure that purchased services are used in a cost-effective manner, the Commission requires applicants to base their requests for services on an approved technology plan.<sup>182</sup> Section 54.504(b)(vii) states that in its FCC Form 470 the applicant must certify that its technology plan has been approved by its state, the Administrator, or an independent entity approved by the Commission.<sup>183</sup>

100. We propose modifying our existing rules governing the timing of the certification regarding the approval of the applicant's technology plan so that applicants can indicate that their technology plan will be approved by an authorized body by the time that services supported by the universal service mechanism for schools and libraries begin. We believe that the rule change will improve program operation by recognizing that it may be difficult for an applicant to obtain approval of a technology plan well in advance of the commencement of a funding year. We seek comment on the costs and benefits of our proposal.

### D. Computerized Eligible Services List

101. In the Order, we have directed the Administrator to develop a pilot for an online computerized list for internal connections. While we gain operational experience through this pilot program, we seek further comment on the feasibility of an online eligible services list with brand name products in the telecommunications services and Internet access categories. We are concerned, as were many commenters, about the difficulties in describing and amassing information regarding brand name products in these categories.<sup>184</sup> We seek comment on whether this list should be a "safe harbor." We seek comment on whether such a list raises any legal issues. We seek comment on what effect such a list would have on our statutory mandate to evaluate requests for discounts on a competitively neutral basis. For example, how would we create a safe harbor telecommunications services provider list? Would such a list vary by location, state, or region? If a geographic area only had one telecommunications carrier, would it foster or impede competition to place that carrier on the list? We further seek comment on these and other issues raised by the establishment of an online eligible services list.

### E. Other Measures to Prevent Waste, Fraud, and Abuse

102. In the Order, we have established rules to debar persons convicted or held civilly

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<sup>182</sup> See § 254(h)(1)(B); *Universal Service Order*, 12 FCC Rcd at 9077-78, paras. 572-574. See also SLD's website, <<http://www.sl.universalservice.org/apply/step2.asp>>. To qualify as an approved Technology Plan for a Universal Service discount, the plan must meet five criteria. The plan must establish clear goals and a realistic strategy for using telecommunications and information technology to improve education or library services. The plan must have a professional development strategy to ensure that staff know how to use these new technologies to improve education or library services. The plan must include an assessment of the telecommunication services, hardware, software, and other services that will be needed to improve education or library services. The plan must provide for a sufficient budget to acquire and support the non-discounted elements of the plan: the hardware, software, professional development, and other services that will be needed to implement the strategy. Finally, the plan must include 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.

<sup>183</sup> 47 C.F.R. § 54.505(b)(vii). See also *Universal Service Order*, 12 FCC Rcd at 9078, para. 574.

<sup>184</sup> See *supra* para. 35.

liable with respect to the schools and libraries support mechanism from participating in the program.<sup>185</sup> We also believe, however, that there may be circumstances not culminating in a criminal conviction or civil judgment that may warrant debarment. We accordingly seek to further develop the record on debarment in situations where evidence of misconduct is less clear-cut. We also seek further comment on other measures to limit waste, fraud, and abuse.

103. *Adoption of Governmentwide Regulations* As noted above, an NPRM is pending that proposes, among other things, to allow independent regulatory agencies to elect to participate in governmentwide debarment rules.<sup>186</sup> We seek comment on whether we should adopt the governmentwide nonprocurement debarment regulations, which inform the rules we adopt today. The current governmentwide rules do not apply to independent agencies.<sup>187</sup> However, the proposed governmentwide rules explicitly allow for adoption by independent agencies.<sup>188</sup> We seek comment on whether, if these governmentwide rules are adopted, we should elect to participate in the governmentwide debarment rules for purposes of the schools and libraries universal service support mechanism, or whether, given the unique nature of the program, adoption of the proposed governmentwide rules would be inappropriate or less effective than other rules we adopt.

104. *Debarring willful or repeated violators* A rule allowing for debarment of willful or repeated violators of our rules could be an important tool for ensuring the integrity of the program, because there may be situations in which persons may not be convicted or held civilly liable, yet their continued program participation may still constitute a threat to the integrity of the program.<sup>189</sup> Moreover, some applicants or service providers may reach settlement with prosecuting authorities in a given case without admission of liability, that otherwise would have resulted in a conviction or civil judgment. Accordingly, we tentatively conclude that the Commission should have the flexibility to debar a person whose willful or repeated violation of Commission rules threatens to undermine program integrity and result in waste, fraud, or abuse. Debarring those who have violated program rules in this manner not only ensures accountability within the program, but allows for additional funding for more deserving persons.

105. The “willful or repeated” standard is based upon existing Commission forfeiture authority under section 503(b).<sup>190</sup> Consistent with section 312(f) of the Act, we propose to define “willful” as “the conscious and deliberate commission or omission of any act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.”<sup>191</sup> We propose to define “repeated” as “the commission or omission of any act more than once or, if such commission or

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<sup>185</sup> See *supra* para. 64.

<sup>186</sup> See *supra* n. 128.

<sup>187</sup> See, e.g., 28 C.F.R. § 67.105.

<sup>188</sup> See Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants), Proposed Rule. 67 Fed. Reg. 3266, 3288 (2002) (Proposed Rule \_\_.645).

<sup>189</sup> For example, unindicted co-conspirators may not be convicted.

<sup>190</sup> See 47 U.S.C. § 503(b)

<sup>191</sup> See 47 U.S.C. § 312(f).

omission is continuous, for more than one day.”<sup>192</sup> We seek comment on the proposed definitions.

106. Because it is not our intention to debar persons that inadvertently make mistakes, even if repeated, with respect to program rules, we propose debarring only those willful or repeated offenders whose actions threaten to undermine program integrity and result in waste, fraud, or abuse. We believe that this standard adequately balances the need to strictly enforce our rules with our desire not to debar applicants whose mistakes do not undermine program integrity.<sup>193</sup> We seek comment on these tentative conclusions.

107. *Determination of violation resulting in debarment* We seek comment on how the Commission should determine when a person whose willful or repeated violation of Commission rules (or the Administrator’s procedures) threatens to undermine program integrity and result in waste, fraud, or abuse. We also seek comment on whether only the violations of certain rules or procedures should be considered, and if so, which ones. We seek comment on the appropriate period of debarment and whether such period should be fixed or discretionary.

108. We also seek comment on the process whereby the Commission would determine that willful or repeated violations of our rules (or of the Administrator’s procedures) have occurred. Ordinarily, SLD determines in the first instance whether an applicant has complied with program requirements in the course of reviewing requests for discounts. If SLD concludes that an application is not consistent with the Commission’s rules, it issues a decision, and the applicant may seek Commission review of SLD’s decision to deny discounts.<sup>194</sup> We seek comment on how to implement debarment in the absence of a formal SLD decision denying a request for discounts. We propose that if SLD suspects that a person has willfully or repeatedly committed acts that threaten to undermine program integrity and result in waste, fraud, or abuse, either in the course of application review or subsequently, it may refer the matter to the Commission, which would then begin an investigation that may culminate in notice of proposed debarment to the person. We seek comment on this approach.

109. *Notification procedures for debarment* We also seek comment on what procedures would ensure adequate notice to persons subject to debarment proceedings for willful or repeated violations, while still providing for expeditious Commission determinations in order to adequately protect the program. As informed by the federal agency rules, we propose that the Commission shall give notice of proposed debarment on the ground of willful or repeated violations to the person by: (1) giving the reasons for the proposed debarment in terms sufficient to put the person on notice of the conduct or transaction(s) upon which it is based and the cause relied upon; (2) explaining the applicable debarment procedures; (3) describing the potential effect of debarment. The person would be afforded an opportunity to respond and submit information and argument within 30 days after the notice is published. The Commission would then make a decision on the basis of all the information in the administrative record, including any submission made by the respondent, and provide notice to the respondent. We seek

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<sup>192</sup> *Id.*

<sup>193</sup> For example, an applicant who repeatedly violates Commission rules one year only by failing to observe the 28-day waiting period, and who fails to make the required FCC Form 470 certifications the next, would likely not undermine program integrity. See 47 U.S.C. § 54.504.

<sup>194</sup> 47 U.S.C. § 54.719.

comment on these procedures.

110. *Other grounds for debarment* We also seek comment on whether we should adopt a rule debarring persons who, in the course of their participation in the schools and libraries support mechanism, commit any other act indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of the person.<sup>195</sup> We also seek comment on whether to exercise discretion to debar persons who commit any other act indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of the person, even if unrelated to schools and libraries support mechanism, and invite comment on specific examples of conduct that would warrant debarment.<sup>196</sup> We seek comment on how, if the Commission adopts either provision, the Commission should implement debarment.

111. *Imputation for debarment* We recognize that there may be circumstances in which debarment of one entity—whether under rules we adopt today or under any additional rules we may adopt in the future—may not adequately protect the integrity of the program. For example, there may be circumstances where one person is found liable for certain actions, but other individuals have also engaged in misconduct that threatens the integrity of the program. We seek comment on rules for imputation of conduct from one person to another, based upon the federal agency rules governing imputation of conduct. Under our proposed rules, the conduct of a person may be imputed to another person when the conduct occurs in connection with the former's performance of duties for or on behalf of the latter, or with the latter's knowledge, approval, or acquiescence. One example of evidence of such knowledge, approval, or acquiescence could be the latter's acceptance of the benefits derived from the conduct.<sup>197</sup> The conduct may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the person who participated in, knew of, or had reason to know of the person's conduct. In addition, the conduct of one person may be imputed to other persons in a joint venture or similar arrangement if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of those persons. One example of evidence of such knowledge, approval, or acquiescence could be the latter's acceptance of the benefits derived from the conduct.<sup>198</sup> We seek comment on the administrative process for making a finding that the conduct of one person should be imputed to another. We seek comment on these proposed rules.

112. *Effect of debarment* We seek comment on what effect, if any, suspension or debarment of a person should have with regard to the person's participation in other activities associated with the Commission. For example, should suspension or debarment of a service provider from the schools and libraries support mechanism preclude participation in providing certain services to the Commission, such as Internet access or telephone service? Similarly, should suspension or debarment from the schools and libraries support mechanism also result in suspension or debarment from other universal service support mechanisms?

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<sup>195</sup> See, e.g., 28 C.F.R. § 67.305; see also 48 C.F.R. § 9.407-3 (Federal Acquisition Regulations).

<sup>196</sup> See, e.g., 28 C.F.R. § 67.305.

<sup>197</sup> See, e.g., 28 U.S.C. § 67.325.

<sup>198</sup> *Id.*

113. *Changing service providers post-debarment* We seek comment on whether our rules should permit applicants whose service provider has been debarred to change their service provider before their application for discounted services has been approved or after the last date for invoices. SLD's current operating procedures permit applicants whose service providers have been debarred to change service providers only after SLD has issued a funding commitment decision letter, and no later than the last date to submit an invoice.<sup>199</sup> The existing procedure allowing SPIN changes within this window balances fairness to applicants and flexibility in the program with goals of program efficiency, including the importance of certainty and finality so that the Administrator can properly allocate limited funds among a large pool of applicants. If applicants were permitted to change service providers after they had applied for discounts but before SLD had made a funding commitment decision, it may be more difficult for SLD to determine whether program requirements are met if an applicant changed service providers because of potential irregularities. Permitting applicants to change service providers after the last date for invoices to be submitted could introduce a lack of finality into the process, undermining our efforts to streamline program procedures.

114. We seek comment on whether applicants whose service providers have been debarred should be permitted to change service providers before a funding commitment decision has been issued, or after the last date for invoices. We seek comment on how such a rule might reconcile our goals of ensuring both fairness and finality. We seek comment on what procedures SLD might implement in such situations.

115. We further seek comment on whether applicants that are complicit in the bad acts of a debarred service provider, but who are not themselves convicted or held civilly liable, should be permitted to change service providers in the same manner as applicants that were not so complicit. While we do not intend to punish applicants that are merely innocent victims of a particular service provider, we also do not want to create incentives for applicants to undermine the goals of the program through complicity in program violations by a service provider. We therefore seek comment on whether complicit applicants should not be permitted to change service providers (and therefore are effectively debarred for that funding year), and if so, how such a standard of "complicity" should be defined. Finally, we seek comment generally on whether any other rules should be adopted relating to debarment that would serve our goals of protecting against waste, fraud, and abuse.

## V. PROCEDURAL ISSUES

### A. Paperwork Reduction Act Analysis

116. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 (PRA) and found to impose new or modified reporting and/or recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and/or recordkeeping requirements will be subject to approval by the Office of Management and Budget (OMB) as prescribed by the PRA. Specifically, section 54.514(b) will go into effect upon announcement in the Federal Register of OMB approval, and sections 54.500(k), 54.503, 54.507(g)(i-ii), 54.517(b), and 54.514(a) will go into effect July 1, 2004.

<sup>199</sup> See *supra* para. 75. See also SLD website, Operational Spin Change (January 2, 2003) <http://www.sl.universalservice.org/reference/OperationalSpin.asp>.