

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

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

**COMMENTS OF THE NATIONAL ASSOCIATION
OF STATE UTILITY CONSUMER ADVOCATES
ON SECOND REPORT AND ORDER AND
FURTHER NOTICE OF PROPOSED RULEMAKING**

These are the comments of the National Association of State Utility Consumer Advocates (NASUCA)¹ in response to the *Second Report and Order and Further Notice of Proposed Rulemaking* (Order) in this proceeding.

First, we would like to stress our support and appreciation for the universal service support mechanism for schools and libraries, the “E-Rate” program. In the few short years of its existence, E-Rate has been directly responsible for assuring the connectivity that has made it possible for most of the nation’s children, including, most importantly, most of the nation’s low-income children, have ready access to the internet and other educational telecommunications services.² It is an extraordinarily successful product of the Telecommunications Act and should continue to be nurtured.

The rules adopted in this Order provide for useful streamlining of the process while leaving the substance of the successful program unchanged. Particularly helpful are the rules providing for funding of appeals and for rolling over unused funds. Also welcome is the increased emphasis on oversight. Although E-Rate has been a success, it is clear from recent reports, including that of the FCC’s own Inspector General, that the mature program is ripe for abuse. The debarment rule adopted in the Order to eliminate certain “bad actors” from program participation is a good, visible first step in eliminating abuse.

NASUCA has comments in three areas of the Proposed Rulemaking: Technology Plan; Computerized Eligible Services List; and Other Measures to Prevent Waste, Fraud, and Abuse.

¹ NASUCA is an association of 42 consumer advocates in 40 states and the District of Columbia. NASUCA’s members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.

² See, for example, “e-rate [a vision of opportunity and innovation]”, prepared by the Education and Libraries Networks Coalition (EdLiNC), available at www.edlinc.com

I. THE COMMISSION SHOULD ADOPT THE PROPOSED CHANGES TO THE RULES ON APPROVAL OF THE TECHNOLOGY PLAN AND REQUIRE THAT THE PLAN BE FILED WITH THE APPLICATION, AFTER APPROVAL.

Adopting the proposed rule (Order, ¶ 100) and allowing the applicant to certify that the technology plan *will be* approved by the authorized body, instead of requiring certification that the technology plan *has already been* approved eliminates a Catch-22 for applicants: In many instances the authorizing body will not approve a plan before funds are available. This results in a circular frustration for applicants: The applicant cannot obtain funding until the plan has been approved, yet cannot obtain plan approval until there is funding.

Allowing the plan to be approved after funds are committed but before they are actually spent would eliminate this potentiality. In order to assure that the plans *are* properly approved, however, as well as to provide a paper trail should there be any question of waste, fraud, or abuse, the applicant should be required to submit a copy of the approved technology plan to be associated and maintained with the application file. Failure to submit within a reasonable period of time, perhaps 90 days after funds are committed, should result in a revocation of the funding decision.

II. THE COMMISSION SHOULD NOT, AT THIS TIME, PUBLISH AN “ELIGIBLE SERVICES LIST” FOR TELECOMMUNICATIONS SERVICES OR INTERNET ACCESS.

In the Order, the Commission creates a pilot project to establish a computerized eligible services list for internal connections, and in the Proposed Rulemaking, asks if such a list would be appropriate for telecommunications services and internet access as well. Order, ¶ 101.

The list for internal connections is almost certainly a good idea. It is our understanding that most applicants that run afoul of the “30% Rule” (i.e., have their applications denied because more than 30% of the services requested are ineligible; Order, ¶ 38) have asked for ineligible internal connections. An eligible services list for internal connections would reduce the number of applications summarily denied under this rule by allowing the applicant to know with certainty that the services requested were eligible.

To be effective, however, the list *must* provide a “safe harbor.” If a service is listed, the applicant must be assured, *ceterius paribus*, that a request for that service will be approved. Otherwise the list would be useless.

It is very difficult, however, to reconcile a “safe harbor” list of all eligible services with the requirement for open, competitive bidding. A list, were it to include such things as brand names and USOC codes, would need to be all-inclusive in order not to bias the

competitive process. This is probably impossible, given the number of companies providing eligible services. Even if feasible, continual timely updates to the list would be required. On the other hand, if the list did not include specific identifying information and described only generic services, it would be of little or no use. Finally, even if a comprehensive list could be prepared and kept current, the very existence of the list would disincent applicants from putting their projects out to bid. If the applicant can pick from a pre-approved (“safe harbor”) list of services, there is some motivation for avoiding a full-blown competitive bidding process.

Recent reports concerning waste, fraud, and abuse in the program identify failure to properly follow the required bidding process as the most prominent abuse. This being the case, nothing should be done that would undermine the bidding process. NASUCA recommends, therefore, that the Commission not proceed with development of lists for telecommunications services and Internet access until we have gained experience with the pilot project for internal connections.

If, however, a significant number of applicants are requesting ineligible telecommunications services or Internet access and if a significant number of these are having their applications summarily denied under the 30% rule, then perhaps other mechanisms to reduce the number of such requests should be explored. For example, if experience shows that the same ineligible services are being requested over and over, then perhaps a list of *ineligible* services might be considered. Such a list would be competitively neutral insofar as providers of the listed services are allowed to modify the services so as to achieve compliance. However, an “ineligibles list” cannot provide a safe harbor – applicants should not be allowed to assume that any service not listed is pre-approved.

III. THE COMMISSION SHOULD DEVELOP AN ADMINISTRATIVE PROCEDURE FOR IMPOSING DEBARMENT AND OTHER PENALTIES.

In this Order the Commission adopts a rule establishing debarment as punishment for those that abuse the E-Rate program. However, in adopting debarment only for those found criminally or tortiously liable for an act directly impinging on the E-Rate program, the rule establishes a standard of wrongdoing that is both too high and too narrow. Further, debarment, while almost certainly an effective punishment, should not be the only alternative for dealing with varying degrees of abuse.

NASUCA therefore recommends that the Commission pursue the development of a purely administrative procedure and of a “willful or repeated violator” standard for debarment. Such a procedure should, of course, include the full panoply of protections provided for in the Administrative Procedures Act, as well as other controlling law. The decision to debar should be reviewable in a competent court, but it should not be dependent, in the first instance, on a finding by a court.

The approach suggested in paragraphs 104 – 109 of the Order appears to be viable. However it does put a significant new task in the lap of the Schools and Libraries Division (SLD) of the Universal Service Administrative Company. Since the recent reports of waste, fraud, and abuse indicate that perhaps the major problem is a lack of adequate oversight staff, SLD must be assured of adequate staff in order for any enforcement mechanism to be successful.

The Order allows for punishment only where there has been direct abuse of the program. While direct abuse certainly deserves debarment, there are other instances of behavior that might be worthy of debarment as well. E-Rate is a public trust, and anyone who has proved themselves to be unworthy of the public trust should not be allowed to participate. Thus, as the Commission suggests, someone with a history of dishonesty in business, and certainly those convicted of fraudulent behavior, would be questionable participants in the program. Order, ¶ 106.

On the other hand, complete debarment from the program, even for a limited period of time, may be too draconian a penalty to impose on someone who has once erred and has since “repented.” Indeed, for example, debarment based on a prior fraudulent act, for which the individual has already been tried, convicted, and punished, may amount to *ex post facto* punishment. The Commission should, therefore, explore alternatives to debarring suspect individuals who do not pose a clear and present danger of abusing the program. One approach might be, for example, to require those who have an established pattern of suspect behavior but who do not pose an imminent threat to post a bond, forfeitable upon a later act of abuse, as a requirement for program participation.

The Commission, then, in developing an administrative procedure for detecting, prosecuting, and punishing acts of abuse, must retain flexibility and discretion not only in defining prohibited acts and developing ways of detecting them, but also in devising penalties. All acts of abuse are not created equal: Some are certainly much more harmful than others, and those more egregious acts should be punished more heavily. Thus we recommend that the Commission adopt its suggestions that certain acts leading to debarment may be further punished by a prohibition on participation in other universal service programs, imposition of a government-wide ban on procurement, or even imposition of the equivalent of a “death penalty” – debarment for life. The Commission should also consider referring administrative findings of abuse of the program and punishment to the state commissions in the states where the wrongdoer operates. Many states have programs parallel to E-Rate, and an abuse of the federal E-Rate program is most probably also an abuse of the state program.

The Commission should also, however, explore ways to punish abusive acts that may not deserve debarment. An entity, for example, may have provided quality service at reasonable, competitive prices, having thus caused no discernible damage to the program, yet have established a pattern of avoiding the open bidding process. Most certainly this behavior should be penalized, but debarment is almost as certainly too harsh a penalty. Lesser penalties should be devised for such behavior. In this example, perhaps merely

imposing a closer review, in real time, of the transactions the abusive entity engages in may be an adequate incentive to comply.

Finally, in devising penalties, the Commission must be careful about who it is that is being penalized. In short, no penalty should devolve unto the children that are the ultimate beneficiaries of the program. For this reason, the Commission should consider very carefully its suggestion that schools found to be complicit in abusive acts be also, in effect, debarred.

When a school is debarred it is not, in the end, the school that is deprived of E-Rate funded services. It is the children in that school who are deprived. Many of those children are currently on the right side of the digital divide only because of E-Rate services. None of them, almost certainly, were complicit in any abusive act. To deprive these children of services and put them back on the dark side of the digital divide is to taint the children with the sin of their school and is clearly unfair. This is not to say that a school that has engaged in a multi-year conspiracy with a provider to fake internal connection projects and split the money should not be punished. However, in deciding what to punish and how to punish the Commission should always consider first the welfare of the ultimate program beneficiaries – the children.

NASUCA appreciates this opportunity to suggest these improvements to the E-rate program, and recommends that the Commission adopt these changes.

Respectfully submitted,

ROBERT S. TONGREN
CONSUMERS' COUNSEL

David C. Bergmann
Chair, NASUCA Telecommunications Committee
Assistant Consumers' Counsel
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574
bergmann@occ.state.oh.us

NASUCA
8300 Colesville Road, Suite 101
Silver Springs, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380