

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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

The following comments are submitted in response to the Commission’s Third Report and Order and Second Further Notice of Proposed Rulemaking, FCC 03-323 in Docket No. 02-6, requesting comments on various aspects of the E-rate program.

E-Rate Central is an independent firm providing E-rate application services to public and private schools. It holds the contract to provide statewide E-rate support for the New York State Education Department and, in this role, has been an active member of the State E-rate Coordinators Alliance (“SECA”) organized under the auspices of the Council of Chief State School Officers (“CCSSO”). E-Rate Central was also represented on the SLD’s 2003 Task Force for the Prevention of Waste, Fraud and Abuse.

E-Rate Central’s combined roles, both at the local applicant level and the national policy level, afford it a unique view of the program’s processes and benefits.

**COMMENTS**

*General*

- 1. Many of the requests for comments suggest serious consideration of new rules and procedures which would add to program complexity. The program is already far too complex.**

Each year since its inception, the E-rate program has become more complex and bureaucratic. Applicant-specific deadlines have been imposed for service certifications and invoice submissions. Minimum processing standards, requiring perfection on forms that change annually, have been used to deny or reduce applicant funding. Selective reviews have been expanded dramatically requiring extensive applicant efforts to respond while delaying funding decisions for months on end. General principles involving planning, procurement, and eligibility have evolved into ever more detailed rules and procedures, many of which are announced midway through a funding cycle and which

may be missed by the majority of applicants who do not have resources to track the E-rate program on a continual basis.

Indicative of the program's complexity is the increasing inability of the FCC or SLD to be able to fully explain new principles or rules. *eSchool News* published a telling article in December 2003 discussing applicant frustration with nine new rule changes that remained unresolved just weeks before the FY 2004 Form 471 deadline. Our own count at the time was eleven unresolved issues.

Requested comments in this NPRM suggest consideration of many new rules and procedures wrought with additional complexity. Examples include: (a) modification of the Form 470 for "certain" types of service; (b) procedures to ensure cost effective services when no competing bids are received (including limits on the amount of discounts available in such situations); (c) service provider certification of independently developed bids; (d) adoption of the Rural Health Care program's new definition of Internet access (which neither the FCC nor the program's administrator seems able to explain); (e) new rules linking applicant installation charges with upfront carrier plant investments; (f) additional limits on "unlit" or "dark fiber" systems (two terms that are sometimes used as synonymous and, at other times, as not); (g) expanded rules on the recovery of funds; (h) establishment of a "bright line" test for cost-effective funding requests; (i) a ceiling on the total amount of applicant funding; (j) imposition of audit, review, and recordkeeping requirements for service providers; (k) identification, registration, or service prohibitions for entities providing "any form" of technology planning or procurement management; (l) codification of invoice extension request procedures; (m) new technology planning requirements, including a required lease vs. purchase analysis; (n) subunit certification of application filing authority; (o) new rules regarding school lunch eligibility surveys; and (p), priority for applicants that have not yet achieved Internet connectivity.

Many of the proposed new rules are driven by concerns involving waste, fraud, and abuse. Our position on these matters was actually best expressed by FCC Commissioner Michael Copp last November who, in a separate statement concerning new rules for the similar Rural Health Care program stated:

"We are justifiably concerned with deterring waste and abuse, but we should recognize that the complexity of the process here is deterring worthy applicants — and that is really waste and abuse."

### ***Discount Matrix***

- 2. Continued concerns with waste, fraud, and abuse, together with the need to fund Internal Connections at lower discount rates, reaffirm our recommendation and analysis supporting a reduction in the maximum discount rate.**

In the Initial Comments of the Council of Chief State School Officers (“CCSSO”) to the FCC’s Notice of Proposed Rulemaking in CC Docket No. 02-6, FCC 02-8, in April 2002, and in subsequent policy briefs, the State E-Rate Coordinators’ Alliance (“SECA”) recommended that the maximum E-rate discount on Internal Connection (“Priority Two”) services be reduced from 90% to 70%. The rationale for the reduction was two-fold: (a) to make more Internal Connections funds available to lower discount applicants; and (b), to reduce incentives for waste, fraud, and abuse by requiring applicants to make a greater, albeit still highly subsidized, contribution to their technology initiatives.

In our own NPRM comments filed last July, E-Rate Central supported a reduction in the maximum discount rate for Internal Connections and discussed a detailed analysis it had undertaken on SECA’s behalf to determine the impact such a change would have had on FY 2000 funding. The two basic conclusions of the study were:

- a. With a maximum discount of 70%, Internal Connections funds, that had been available only to applicants with 86-90% discounts, could have been provided to applicants with discounts as low as 50%.
- b. By making funding available at lower discount rates, large city school districts with individual schools at a range of discount rates would stand more to gain by the increased funding of their lower discount schools than they would lose by a reduction in funding for their highest discount schools.

As an alternative to reducing the discount rate only for Internal Connections, a case can be made for reducing the discount rate — perhaps to 80% instead of 70% — for all eligible services. This would provide consistency (and simplicity) throughout the discount matrix, and would avoid creating additional incentives to try to push Priority Two services into Priority One.

### ***Competitive Bidding Process***

- 3. Competitive bidding rules need to be reevaluated within the context of an explicit discussion of the role of E-rate in the establishment of national school and library procurement policies and practices.**

Early FCC decisions on E-rate procurement issues relied heavily on the premise that payment of the applicant’s share of any E-rate eligible service provided sufficient incentive for that applicant to select the most cost-effective solution. More recent SLD and FCC guidance, Selective Reviews, and audits all appear to be leading to a requirement for more formal competitive bidding procedures. The latest list of Form 470 Reminders on the SLD Web site: (a) recommends the use of formal RFPs; (b) sets forth an illustrative bid weighting paradigm; (c) lists bid evaluation documentation requirements; and (d) notes that the SLD may review “competitive bidding and vendor selection processes.”

Before E-rate rules governing even low dollar value services are transformed into the equivalent of multi-billion dollar governmental procurement procedures, we believe that an explicit policy should be debated and adopted regarding the role that the SLD and the FCC are to play in school and library procurement processes. As an alternative to the adoption of ever stricter procurement rules, the FCC should consider the impact of reducing the maximum discount rate (as recommended above) as an inducement for applicants to make cost-effective choices.

**4. Specific attention must be paid to reforming competitive bidding policies to address total project or service costs.**

One specific problem that has arisen in connection with E-rate procurement practices is the FCC's insistence that competitive bid analyses consider only the costs of eligible services. Since telecommunications and technology projects often involve a combination of eligible and ineligible services, such partial cost analyses violate all rational state and local procurement rules.

As an example, consider the situation in which a school is presented with two annual cellular quotes, one from Carrier A for \$30/month for 25 users using existing phones, and one from Carrier B for \$28/month requiring the purchase of 25 new phones at \$100 each. Total costs for Carrier A's service would be \$750 for the year, while total costs for Carrier B's service would be \$3,200. Under current FCC rules, and everything else being equal, Carrier B's service would have to be rated as more cost-effective because the applicant would be precluded from considering the \$2,500 in ineligible phone costs. This is clearly nonsense and needs to be changed.

**5. The current Form 470 process is burdensome and ineffective. It should be replaced with a vendor-focused, Web-hosted planning and procurement applicant database.**

As used by most applicants, and as required by SLD rules, service descriptions provided in the Form 470 are quite general. Typically, except in the cases of a large project with a formally associated RFP, the Form 470 provides only a broad indication of applicant needs. In and of itself, it does not provide vendors with sufficient information to prepare and submit actual bids.

To vendors, the most valuable aspect of the Form 470 is the identification of applicant technology and/or purchasing personnel. Many vendors use this information to expand their direct marketing databases or, less frequently, to initiate sales calls.

To applicants, unfortunately, the most significant aspect of the Form 470 is that it is a perfunctory requirement that often leads to denials of their Form 471 applications because of Allowable Contract Date problems or service description inconsistencies.

One alternative, which would both simplify the application process and increase the amount of marketing information available to vendors, might be to replace the current Form 470 filing process with a Web hosted applicant database containing basic planning and procurement information. We envision a database template containing: (a) basic school and library information (sites, student or patron counts, etc.); (b) technology and purchasing contacts; (c) procurement guidelines; (d) current technology assessment; (e) recurring service needs; and (f), future technology initiatives. Information on a specific applicant, once posted, would be available to vendors year round, and could be edited and updated by the applicant as needed (with the only requirement being that the applicant sign on and certify its accuracy at least once a year). With a proper technology component, this database might effectively alleviate the need for technology plan review and approval.

### *Wide Area Networks*

- 6. Infrastructure investment rules need to distinguish between applicant installation costs and carrier capital investments. Limiting installation costs to a percentage of recurring costs, rather than setting absolute dollar ceilings, is fairer to large city applicants and consortia.**

Several of the requests for comments on WANs refer to discounts on capital investments incurred by service provider rather than on installation charges incurred by applicants. While the two can be related, they are not the same. E-rate, which provides discounts on applicant payments, should deal with installation charges.

Limits on discounts on installation charges, tied to absolute dollar amounts, are inherently unfair to large individual applicants or consortia, but fail to address smaller and perhaps abusive pricing structures. A simple rule limiting installation charges to a percentage of annual or life-of-contract recurring service charges would be fairer to all parties.

- 7. FCC rules and definitions regarding unlit, unused, or dark fibers need to be clarified.**

The request for comments on “unlit (dark)” fiber appears to confuse two distinct terms. As we understand the terms, “lit” or “unlit” fiber refers to whether the system is actually operational. As defined in the SLD’s Eligible Services List, however, a “dark” fiber system is one in which the fiber service provider does not provide the modulating electronics. Assuming that the applicant is providing the modulating equipment, the applicant has an operational (or “lit”) system even though the carrier is providing a “dark fiber” service.

After considerable discussion, the SLD has clarified that the minimum carrier-provided electronics needed to avoid a “dark fiber” service is a copper-to-fiber converter (also known as a “TX-to-FX converter” or a “GBIC”). This is a useful clarification in part because it provides the basis for an easy and inexpensive conversion of existing dark

fiber contracts to eligible “lit” fiber service contracts by FY 2004. As a minimum, the FCC’s decision in this NPRM should confirm the SLD’s clarifying information. Even better — although we recognize that such a decision could have ramifications beyond E-rate — the FCC should recognize that based on the minimal cost of TX-to-FX converters there is little practical difference between dark fiber services and lit fiber services. As a result, the FCC should eliminate the eligibility distinction altogether. This change would also correct one seemingly nonsensical condition permitting dark fiber Internet services while prohibiting dark fiber telecommunications services.

The FCC should also clarify that “unlit” fiber means an unused or inoperable fiber. It should also distinguish between unlit fiber cables and unlit fiber strands. Fully unlit fiber cables should not be E-rate eligible. Charges for unlit fiber strands in a backbone network that are reserved for future applicant use should not be eligible (although cost allocations between lit and unlit strands should recognize the lower incremental, not the full proportional, cost of the unlit strands). There is no need to allocate, and treat as ineligible, unlit strands in entranceway facilities of otherwise lit fiber WANs.

### ***Recovery of Funds***

- 8. As a general rule, recovery should be sought from the party filing the invoice — the school or library for a BEAR and the vendor for a SPI. If the above change is made, it would be appropriate to also change the basic BEAR reimbursement process so that payments can be made directly to schools and libraries.**

There should be a reasonable, but rebuttable, presumption that the party submitting an E-rate invoice is most responsible for its accuracy as to amount and eligibility. In the absence of evidence to the contrary, the recovery of improperly disbursed BEAR payments should be sought from applicants; recovery of incorrect SPI payments should be sought from service providers. Note that the recovery of BEAR payments from applicants should resolve most of the vendor liability issues surrounding Good Samaritan payments.

If the above change were made, it would be appropriate to change the basic BEAR reimbursement process so that payments could be made directly from USAC to schools and libraries. This would also eliminate a number of the operational problems and delays experienced by applicants when reimbursements payments are unnecessarily funneled through vendors.

The principle of funds recovery is important in and of itself. Recovery of *de minimis* amounts should not be waived on a percentage basis, but a cost-effectiveness case could be made for waiving small absolute dollar amounts (e.g., under \$250).

- 9. The FCC should address and approve a pending request to waive the recovery of funds associated with fees incurred for independent, applicant-initiated audits.**

FCC fund recovery rules should not financially penalize applicants for initiating independent audits of their E-rate eligible services. Should such audits identify excessive charges, the amount of USAC funds to be recovered should be based on the net payments received after accounting for professional audit costs incurred by the applicant.

A request to waive one aspect of the current recovery rules is pending before the FCC. In October 2003, the New York City Department of Education (NYCDOE) submitted a waiver request to the FCC for relief on the recovery of discounts related to refunds it had received as the result of telephone service audits. NYCDOE, which itself had initiated the audits, had voluntarily refunded to USAC an amount based on the funds it recovered (net of contingent audit fees) and its aggregate discount rate. USAC subsequently requested recovery of an additional amount based on gross funds recovered which, after audit fees, would result in a net loss to NYCDOE. As a matter of good public policy, this waiver should be judiciously addressed and approved.

#### ***Cost-Effective Funding Requests***

- 10. We support the development of pricing benchmarks, but recommend the deferral of annual funding ceilings until the effects of other changes can be analyzed.**

The development of pricing benchmarks would provide useful guidelines for applicants purchasing services as well as for PIA reviewers. All parties should understand that funding requests made in excess of such benchmark levels would be subject to heightened scrutiny.

Consideration of ceilings on annual funding should be deferred until the effects of other changes — the new “2 in 5” rule, possible benchmarks, and/or discount matrix changes — can be analyzed.

#### ***Recordkeeping Requirements***

- 11. Service providers should be subject to equivalent audits, reviews, and recordkeeping requirements.**

This is an easy issue. The E-rate program is beneficial to applicants and service providers alike. Similarly, both applicants and service providers have been involved in instances of waste, fraud, and abuse. As both a point of fairness, and as an enforcement tool, both applicants and service providers should be subject to equivalent types of audits, review, and recordkeeping requirements.

### *Consultants and Outside Experts*

- 12. Unless carefully targeted, rules to identify and register “any” party providing technology planning, or to prohibit service providers from providing “any form” of such services, would deprive many applicants of needed expertise and would unduly constrain legitimate marketing practices of technology providers.**

As an established E-rate consultant, E-Rate Central has no objection to, and would indeed welcome, USAC registration as an indicator of our professional involvement in the E-rate program. We are greatly concerned, however, with the bureaucratic implications of a rule that would require the identification and/or registration of “any” party that provided technology planning and/or procurement aid. A rule that would prohibit a service provider from providing “any form” of technical assistance or planning to applicants would be even worse.

The marketing practices of many telecommunications and technology firms rely heavily and, in our view, quite properly on consultative selling. Technology projects are typically implemented and upgraded over extended periods and require ongoing involvement from vendors. Products and services are typically not commodities to be sold on price alone. Customers, particularly in the budget-constrained school and library fields, often are not technically self-sufficient and depend heavily upon established vendor relationships for technology assistance, education, and planning.

A rule that would prohibit vendors from providing “any form” of technical assistance would be highly disadvantageous particularly to small and medium sized applicants who cannot afford the hiring of fully independent consultants. Despite current rules that ostensibly permit service providers to provide “vendor neutral” assistance for technology planning and RFP development, many groups of schools and libraries using common vendors have already been denied funding because of SLD perceptions that standardized approaches supported by such vendors represent improper involvement in the applicants’ competitive bidding processes. We believe that it is highly likely that the legitimate marketing practices of some firms, and the funding requests of their customers, are being unfairly characterized as abusive or fraudulent. We are concerned that the broad nature of the registration and service prohibitions suggested by this NPRM will worsen an already difficult situation.

### *Distribution of Support Payments*

- 13. Codification of rules for extending invoice deadlines would reduce the SLD’s flexibility to fairly address applicant invoicing problems.**

Although the SLD has procedures for extending invoicing deadlines under a standard set of circumstances, we have been impressed with the SLD’s flexibility in

granting extension requests in a variety of cases. Often, in our experience, these situations arise from a turnover of applicant personnel. These are excuses that the FCC has routinely rejected in application deadline waiver requests, but for which greater leniency can be tolerated to assure that applicants can benefit from awarded funding. While recognizing that unclaimed discounts cannot be allowed to languish indefinitely, we believe that the continued flexibility of the SLD to approve invoice extension requests is important and should not be unduly constrained by FCC rule codification.

As an alternative, the FCC may wish to encourage the SLD to accelerate procedures to rescind unused funds at fixed intervals after normal invoice deadlines, while providing applicant pre-notification of a final opportunity to request extensions. Such an action would also facilitate the timely roll-over of unused funds into future years.

### *Technology Plans*

- 14. The E-rate program should not be used as a tool to impose ever increasing detailed planning requirements on schools and libraries nationwide. At most, E-rate rules should require certification that an applicant's technology plan meets state or federal education department standards.**

We concur with the principles and objectives of technology planning, and we have no quarrel with an E-rate requirement that applicant plans incorporate the five basic components.

We are deeply concerned, however, with trends in the E-rate program's administration to continually raise the bar with respect to technology plan timing and details. As noted recently by the director of the Department of Education's office of educational technology, new SLD guidance on technology plan requirements reflects a level of operational planning never before requested by state or federal education departments. We believe that the FCC, as a communications agency, should defer to educational agencies with regard to technology planning standards. For E-rate purposes, simple certification of educational planning requirements (e.g., NCLB plans) should suffice.

At the very least, E-rate technology plan approval procedures, currently relying heavily on unfunded cooperation by state agencies, should not be expanded without compensatory funding.

- 15. A planning requirement to analyze the cost of leasing versus purchasing would add unacceptable complexity to the E-rate program.**

A suggestion that E-rate technology plans be required to incorporate a lease-purchase analysis should be rejected as overly complex. A requirement to consider the leasing of Internal Connections equipment would be particularly ironic in light of the new

program rule beginning in FY 2005 that would provide E-rate discounts on lease payments for at most only two of every five years.

### *Use of Surveys to Determine School Lunch Eligibility*

- 16. Statistically, independently controlled surveys may not require a response rate as high as 50%, but rules necessary to assure such independence may prove ineffective or overly burdensome.**

As a theoretical statistical matter, it should be possible to determine lunch program eligibility percentages within an acceptable margin of error with sample sizes of less than 50% of a student population. The cost of assuring such statistical independence, however, may be considerable.

As a more practical matter, respondent biases on school-run surveys are likely to skew results, potentially in either direction, depending upon family demographics and on whether or not the survey is conducted in conjunction with a lunch program application process. In the latter case, an argument can be made for raising, not lowering, the percentage threshold for survey extrapolation.

### *Priority for Applicants that Have Not Achieved Connectivity*

- 17. Special priority for unconnected, or minimally connected, applicants would be both complex and unnecessary.**

The E-rate program, by its sixth year of operation, has been strikingly successful in promoting Internet connectivity. As noted in this NPRM, available data indicates that classroom connectivity has risen from 14% to 92%. Given that at least minimal dial-up connectivity can be obtained through inexpensive, E-rate supported, Priority One services, we believe that the reported 8% shortfall represents either a lack of will on the part of a limited number of schools and libraries or definitional confusion on the meaning of connectivity. As such, the need to provide special applicant priority for basic connectivity appears unnecessary.

If, however, the goal is to provide more universal access at a higher level of connectivity, supported by higher speed access and more sophisticated Internal Connections networks, then following should be considered.

- a. A special priority scheme for minimally connected applicants would require:  
(i) the development of connectivity standards and rules; and (ii) relatively sophisticated review procedures to validate applicant connectivity status. This would likely increase program complexity to an unacceptable level.
- b. E-rate has already provided substantial support for such connectivity for the higher discount applicants. While Internal Connections funding for other lower discount, but still needy, applicants has been limited, new rules that

would extend Priority Two funding to a larger base of applicants either have been implemented or are under serious consideration in this proceeding.

From a broader technology perspective, perhaps the biggest failing of the E-rate program is not that insufficient funding has been made available for eligible services, but that currently eligible services have been too narrowly defined. By providing discounts up to 90% on certain technology products and services, and none on many others, the program has encouraged applicants to devote too many dollars to infrastructure projects and services, and too little to equipment and services needed to actually use the technology. The Item 25 requirement to demonstrate other technology resources does little to redress this imbalance.

A more fiscally neutral and efficient way to address the broader technology needs of schools and libraries would be to expand the list of eligible services and reduce discount levels accordingly.

As a start, we encourage the FCC to consider full eligibility for products and services now requiring cost allocation. This would not only make the program less complex, but would likely prove most beneficial for the smaller and poorer applicants. Making all servers eligible, for example, would extend E-rate funding to small schools and libraries whose networks may require only individual servers which are currently largely ineligible because they are used extensively for applications and storage. Longer-term, The FCC might consider the eligibility of end-user equipment and training.

Respectfully submitted,

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