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

In the Matter of	:	
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Comprehensive Review of Universal Service Fund Management, Administration and Oversight	:	WC Docket No. 05-195
	:	
Federal-State Joint Board on Universal Service	:	CC Docket No. 96-45
	:	
Schools and Libraries Universal Service Support Mechanism	:	CC Docket No. 02-6
	:	
Rural Health Care Support Mechanism	:	WC Docket No. 02-60
	:	
Lifeline and Link-Up	:	WC Docket No. 03-109
	:	
Changes to the Board of Directors for the National Exchange Carrier Association, Inc.	:	CC Docket No. 97-21

REPLY COMMENTS OF THE
SOUTH DAKOTA DEPARTMENT OF EDUCATION
TO COMMENTS IN RESPONSE TO
THE NOTICE OF PROPOSED RULEMAKING
AND
FURTHER NOTICE OF PROPOSED RULEMAKING

I. PROGRAM ADMINISTRATION MUST BE IMPROVED SO THAT E-RATE FUNDING COMMITMENT DECISIONS LETTERS ARE ISSUED ON A TIMELIER BASIS.

The single biggest problem with the way in which the E-rate program currently is administered is the inordinately long period of time that applicants must wait to find out whether their funding requests have been approved. Whatever changes are implemented as a result of this proceeding must be measured as to whether the changes will streamline or further elongate the process for reviewing applications. Any changes that would add to the current arduous review process should be rejected out of hand. Adding to the administrative process will solve nothing, including the prevention of waste, fraud and abuse. The administration of the E-rate program has devolved into a labyrinth of procedures and requirements that rivals the complexity and intricacy of the Internal Revenue Code. Each year, more and more programmatic requirements are layered on top of existing requirements, causing confusion not only for applicants and service providers but also on the part of the E-rate administrator. Mistakes in applying the rules and requirements result in an increasing volume of appeals to challenge the administrator's decisions, which results in more work for the stakeholders, the administrator and the FCC. Clearly, the current course of direction for the program is not sustainable.

When the E-rate program began in 1997, its conceptual underpinnings were that each applicant's technology procurement needs may be different and unique, and funding should be allocated based on the unique needs of each applicant.[1] Over the

[1] *See, e.g.,* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 97-157, Report and Order (released May 8, 1997)(corrected) at ¶432, where the FCC stated:

intervening eight years, the manner of reviewing applications has become rigidly uniform and unwaveringly suspicious. Each applicant is viewed skeptically and suspiciously, as though the applicant has the worst of intentions and is trying to commit some kind of impropriety in order to gain access to E-rate funding. This "guilty until proven innocent" mentality permeates the entire program and frequently has resulted in improper and unfair denials of funding because of the SLD's failure to communicate adequately with applicants and to give applicants *any* benefit of the doubt. The mentality and attitude conveyed time and time again to applicants is that any applicant error– regardless of how minor or how unintentional constitutes an instance of fraud, waste or abuse.[2]

This "one size fits all" approach is completely divorced from any consideration of the varying nature of the kinds of services for which funding is requested; the size of the funding requests; the size of the applicants; and any other variables which significantly influence the potential for waste, fraud and abuse. In its efforts to weed out waste, fraud and abuse – no doubt a laudable and important public policy – the result has been to burden all applicants with every new regulatory reporting requirement regardless of the amount of the funding requested.

> [T]he establishment of a single set of priorities for all schools and libraries would substitute our judgment for that of individual school administrators throughout the nation, preventing some schools and libraries from using the services that they find to be the most efficient and effective means for providing the educational applications they seek to secure. Given the varying needs and preferences of different schools and libraries and the relative advantages and disadvantages of different technologies, we agree with the Joint Board that individual schools and libraries are in the best position to evaluate the relative costs and benefits of different services and technologies. (footnotes omitted).

[2] For example, whenever the Office of Inspector General conducts a beneficiary audit, every instance where an applicant is found to have violated a program requirement is not distinguished between as an instance of fraud, waste or abuse.

Consequently, modest applications for basic Priority 1 telecommunications services are subjected to an overly intensive and unnecessary examination by the Program Integrity Analysis ("PIA") staff which slows down the issuance of Funding Commitment Decisions Letters ("FCDLs") until months and sometimes years after the funding year has begun (and in some instances well after the end of the funding year).

Using the SLD's published information about funding requests submitted by applicants in South Dakota, an analysis of the information shows that there are 677 different funding requests ("FRNs") submitted by 183 different applicants. Of these 677 funding requests, 20 FRNs are for the statewide communications network and will be excluded from this analysis because of the significant size and number of entities included as recipients of service for these FRNs. Of the remaining 657 FRNs (677 total FRNs – 20 FRNs for state network), sixty-five (65) FRNs are for priority 2 internal connections at a discount level lower than 90% -- which cannot be decided until after the FCC and SLD set the funding threshold or lower the funding parameter below 90%. The balance, 594 FRNs (657 – 65) are the total number of FRNs that are eligible to be decided and processed by the SLD. Of that amount, only about one-half or 335 FRNs have been processed as of the submission of these replies to comments. The balance, 267 FRNs or 45% of the FY 2006 FRNs for South Dakota have not yet been decided by the SLD. These undecided FRNs were submitted by 68 applicants who are still waiting to find out whether their applications were approved, nearly six months after the start of the service year and only six weeks before their 471 applications are due for the next funding year. Of the 267 pending FRNs, the total amount of requested discounts is a mere $2.458 million or on average, $9,208.76 per FRN. All but 15 of the 267 undecided FRNs are for Priority 1 services. There are only five FRNs pending for an amount

greater than $100,000, and another 10 FRNs with requests ranging from $25,000 to $99,999. This means that 252 of the undecided FRNs request discounts of less than $25,000. In fact, 18 pending FRNs are for less than $200 per FRN discounts; an additional 34 FRNs request discounts between $201 and $500, and another 54 FRNs request discounts between $501 and $1000. All but eight FRNs request less than $50,000 per year in discounts. It is inconceivable that the SLD has been unable to issue decisions on the vast majority of these modest size FRNs nearly six months after the start of the funding year and nearly 10 months since the applicants submitted these funding requests.[3] Something is dramatically wrong with a program that takes this long to process applications requesting such modest amounts of funding.

The consequences of these funding delays causes more work to have to be undertaken by applicants, service providers and the fund administrator. So much of the fund administrator's work is directly attributable to these delays. Service substitutions and SPIN changes, Form 500 changes to contract start and termination dates have been put into place in order to respond to the problems that arise due to funding delays. Then the administrator does not have sufficient staff to work on these responsibilities and process form 471 applications and the vicious cycle starts all over again.

One of the most beneficial ways to streamline the program is to adopt the State E-rate Coordinators Alliance's recommendation to modify the filing requirements for Priority 1 services. By allowing applicants to rely primarily on the form 471 as the device for requesting funding, the administrator and applicants can concentrate their efforts on

[3] Further, examining the data on an applicant-specific basis rather than an FRN-specific basis, yields similar results. There are 68 different applicants awaiting decisions on the 594 FRNs subject to this analysis. Forty-six (46) applicants have total funding requests of less than $10,000 pending. An additional 12 applicants have total FRNs between $10,000 and $50,000 pending; three applicants have funding requests totaling between $50,000 and $100,000 pending; and, seven applicants have requested total funding of more than $100,000 which have not yet been decided.

reviewing this single form to insure that the program rules have been met. Also, by eliminating the form 486, the Administrator's work burden will be reduced, and more resources can be applied toward timely processing of form 471 applications.

II. OTHER MODIFICATIONS TO THE BASIC FRAMEWORK OF THE E-RATE APPLICATION PROCESS ARE FAR MORE PREFERABLE THAN A DRASTIC CHANGE TO A FORMULA-BASED APPROACH FOR DISBURSING E-RATE SUPPORT.

Although the FCC suggested that a formula-based method for allocating E-rate funds offers the promise of simplicity, this approach is rife with many other problems and obstacles that render this potential solution infeasible. First, even though the vast majority of commenters representing applicants raised many frustrations and concerns over the way in which the program operates, these same commenters nonetheless opposed converting the funding basis to a formula. The breakdown of support or concern with the formulaic approach notably was not defined by how populous a state is, as might have been expected. Governmental entities representing both populous states such as California and New Jersey, and as well as less populous states such as Wisconsin and Alaska expressed concerns over formulas particularly because of the lack of clarity and specificity in the FCC NPRM and uncertainty of whether the formula would be devised fairly.

The NPRM's vague reference to the possibility of converting the distribution process for E-rate and Rural Health Care fails to provide sufficiently detailed information to enable parties to fully evaluate whether a formula approach will be good or bad. The only specific reference point offered by the Commission is the formulaic approach used in the High Cost and Low Income Programs. But as Commissioner Adelstein pointed out in his Statement, "Allocating support based on formulas, like

school size, may ignore critical differences in the cost to obtain services in rural parts of the country and may work against smaller or private schools that cannot achieve economies of scale." This is a particular concern to South Dakota, which is ranked 46th in terms of state population. Despite its substantial geographic size—as the 16th largest state--South Dakota is largely rural and sparsely populated. There is not a plethora of vendors and sources for communications services and products in the state, and the cost of services and products are likely to be considerably more expensive than in urban and more populated areas. Achieving economies of scale and taking into account regional cost differences would likely be lost in any kind of formulaic, one size fits all approach.

Moreover, the High Cost and Low Income Programs base their formulas on actual cost information that is submitted annually by telecommunications carriers to the fund administrator for those programs. This annual submission of data is required of each and every incumbent eligible telecommunications carrier, numbering approximately 1,700 in all, in order to compute the formulas used in those programs. Additionally, the carriers – who are the direct recipients of these funds – must file quarterly line count reports to the administrator. In other words, the adoption of a formulaic approach does not mitigate the complexity of the program; rather it simply replaces one set of procedures for another.

In addition, the development of any kind of formula-driven distribution methodology is likely to take years and will be fraught with controversy. Consider, for example, the Commission's experience in governing and overseeing the High Cost Fund Universal Service Support Mechanisms for rural and non-rural carriers since the passage of the Telecommunication Act of 1996. In addition to referring issues to the Federal-State Joint Board on Universal Service for study resulting in the issuance of

Recommended Decisions, the Commission held numerous workshops; issued a multitude of Orders and made numerous revisions to the formulas for high cost support for rural and non-rural carriers; was subject to appellate review numerous times which resulted in remands that required the Commission to further examine its methodology and underlying legal rationale and issue new orders.

Most importantly, in the arena of High Cost Support, the Commission recognized and agreed to develop two separate mechanisms for computing the amount of support to be distributed to rural companies and non-rural companies. Further, whenever the Commission made a change in the formula for computing support, a "hold harmless" provision was included as part of the transition to assure that the beneficiaries of the Fund would not receive less support under the new calculations compared to the historic way that support was computed. Although South Dakota prefers that the Commission not pursue the adoption of a formula based method for distributing E-rate support, if the FCC is so inclined to pursue this approach, it is vitally important that the FCC distinguish between rural and non-rural geographic areas and establish a "hold harmless" safety valve to assure that applicants do not receive less funding under the formula than they would have received under the existing discount matrix approach.

All in all, the South Dakota Department of Education recommends that the Commission work within the existing framework of the E-rate program and make adjustments to simplify that framework. Applicants and service providers already are familiar with the existing framework and it will be much easier for them to embrace modest changes rather than be subjected to wholesale policy shifts that require them to learn a whole new set of program requirements and rules.

III. STREAMLINING OF FCC OVERSIGHT OF THE E-RATE ADMINISTRATOR IS ESSENTIAL IN ORDER TO IMPROVE E-RATE PROGRAM EFFICIENCY.

In addition to streamlining the application processes, consistent with the recommendations of the State E-rate Coordinators Alliance, the process for communication between the FCC and USAC and the FCC and stakeholders has to improve. As a non-governmental agency not formally authorized by Congress, USAC does not have authority to make policy interpretations or interpret the will of Congress. 47 C.F.R. §54.702(c)(2). When USAC requires policy guidance, the administrator is obliged to seek guidance from the FCC. *Id.*

In turn, it is only fair that the FCC should be required to provide the requested policy guidance, *on a timely basis*, to enable the administrator to perform its responsibilities. There is little benefit to making changes to the application process unless the FCC also modifies its process for communicating with USAC and stakeholders, to insure that it is overseeing USAC properly and in a manner that addresses the concerns of Congress as set forth in various reports issued by GAO and the Commission's Office of Inspector General. Whether resources need to be added, or deadlines need to be established, or more authority needs to be delegated to FCC staff, or a combination thereof is the solution, South Dakota does not know the answer – and can only offer these suggestions.

For example, the large backlog of appeals has been an issue of concern to members of Congress during oversight hearings convened by the House Energy and Committee's Subcommittee on Oversight and Investigations earlier this year. Although intervening events may have arisen to supersede the Commission's commitment, the Commission stated that it would clear the backlog of appeals by the end of the calendar

year. To date, less than 10 appeal decisions have been issued, although whenever inquiries are initiated about the status of the appeal decisions, interested persons are told that the appeal decisions are being reviewed by the Commissioners of the FCC. While the FCC has far more responsibilities than simply attending to the oversight of the Universal Service Programs, it is very troubling that appeal decisions are not issued on a timelier basis, in order to provide applicants with needed answers to policy questions and other advice. The information contained in the appeal decisions is very instructive for assisting applicants in not making the same errors year after year in their applications.

There is no possible way that the E-rate program can be modified to avoid the need for the administrator to seek policy guidance from the FCC: even if the FCC would, in opposition to South Dakota's position and the position of many other parties, establish a formula basis for distributing E-rate support. Even then, the administrator would have questions associated with its implementation of operational procedures, which were not addressed explicitly in FCC orders or rules. The very nature of universal service administration is that there are many detailed policy questions and issues that the administrator is called upon to identify, seek resolution of, and to implement all of those policies into an operations process. Further, the FCC is called upon to review the administrator's operations procedures to confirm that those procedures comply with the FCC policies. Regardless of the manner in which the support calculation is based – on the current method or a formula based approach – the FCC will still have to oversee and communicate routinely with the E-rate administrator, and therefore, a more streamlined communications process must be implemented.

One way to improve the communication is to involve more dialogue among stakeholders and the E-rate administrator via an advisory committee. The reliance on an advisory committee has been quite successful for managing the number administration process, because it enables the stakeholders and the numbering administrator to seek FCC guidance and approvals *after* discussing issues and seeking consensus on possible solutions with various stakeholders. Much consensus emerges from such communications. But unless the E-rate administrator is directed to confer with various stakeholder groups and to consider their views, stakeholders have no official "stake" with USAC and must simply rely on USAC to hopefully seek such dialogue – which sometimes happens and sometimes does not happen. For example, just recently, USAC launched a redesign of its web site for the E-rate program and many applicants are experiencing concerns, confusion and technical problems accessing the content that they used to be able to access. To South Dakota's knowledge, USAC did not seek volunteers to beta test the web site – which would have detected many of these problems in advance and enabled them to repair these problems before introducing the site into production. This committee would complement and does not duplicate the role of the USAC board, because the Board principally oversees the governance of the staff and corporate responsibilities and does not mired down into the day-to-day program operations. The role of the advisory committee would be more detailed and involved with the "nitty-gritty" of the program operation – which is what is needed to be established on an ongoing formalized basis. The committee would assist the FCC by helping narrow the issues for which policy direction is needed, and would provide another level of confidence to the FCC that all different angles and viewpoints were considered before the administrator asked the FCC for guidance. Consensus should

translate into more efficiency in operating the E-rate program, which means there would be less aggrieved parties and fewer appeals, among other benefits.

IV. CONCLUSION

The South Dakota Department of Education respectfully requests the FCC to adopt an Order consistent with the recommendations contained in these Reply Comments.

Respectfully,

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