Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS of FUNDS FOR LEARNING, LLC
on
NOTICE OF PROPOSED RULEMAKING
Regarding the E-rate Program and Compliance with the Protecting Children in the 21st Century Act

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Introduction

Funds For Learning, LLC ("FFL") is a regulatory compliance and web-based software development firm that specializes exclusively in the E-rate program. It has been providing services to the E-rate community since 1997. FFL works with schools and libraries, providing a wide range of services, including assistance with application preparation, the processing of payment-related paperwork, and support through the post-commitment auditing process. In addition, FFL provides consulting services to help companies understand the program's rules and requirements and communicate them within their organizations and to their customers. FFL is proud to have been one of the founding members of the E-rate Management Professionals Association, also known as E-mpa™.

In this notice of proposed rulemaking ("NPRM"), the Commission is proposing to modify its rules to comply with new statutory requirements set forth in the Protecting Children in the 21st Century Act. The Act includes a new certification requirement related to educating students about appropriate online behavior. The Commission is also

proposing rule modifications "to reflect more accurately existing statutory language regarding the CIPA certifications." Our comments will focus on two subjects: (1) the Form 486 certification process and (2) USAC's reliance on the statutory definition of "school" to decide how much E-rate funding a school should receive, as opposed to whether the school is eligible to receive any funding at all.

The problem with using the Form 486 for annual certifications is that many applicants file that form more than once a year. We believe that requiring applicants to make the exact same certification repeatedly creates unnecessary confusion, slows down the application process, and, in some cases may even result in lost funding.

With respect to the statutory definitions of "elementary and secondary schools," what concerns us is how USAC has been, in our opinion, misapplying those definitions. USAC has taken the definitions of eligible schools and used them in a way that we do not believe the Commission ever intended, namely, to reduce and deny funding for services delivered to elementary and secondary schools that have already passed statutory muster.

I. Annual Certifications Should Not Be Made On The Form 486

The Protecting Children in the 21st Century Act requires schools covered by the Act to teach minors about appropriate online behavior and to certify their efforts in that regard. Accordingly, the Commission has proposed revising section 54.520(c)(i) of the rules "to add a certification provision that a school's Internet safety policy must include educating minors about appropriate online behavior, including interacting with other individuals on social networking websites and in chat rooms and cyberbullying awareness and response."

In the NPRM, the Commission reached the "tentative" conclusion that "a recipient of E-rate funding for Internet access and internal connections should be required to certify, on its FCC Form 486 for funding year 2010, that it has updated its Internet safety policy to include plans for educating minors about appropriate online behavior.

The Confirmation of Receipt of Services Form (FCC Form 486) is not, in our opinion, the appropriate form on which any kind of "annual" certification ought to be made. Therefore, we respectfully disagree with the Commission's tentative conclusion. That conclusion is based in large measure, if not entirely, on the observation that "[a]pplicants make their CIPA certifications annually on the Confirmation of Receipt of Services Form (FCC Form 486)" (emphasis added). The Commission's observation is only partially correct. Not all applicants file this form annually; indeed, many file it two, three or more times per year. While we agree that the Form 486 has obvious appeal as a vehicle for making annual certifications, the reality is that the form is simply not a good fit for that purpose. It could be though, as we discuss in more detail below, but only if USAC stops insisting that applicants repeatedly make the exact same certifications.

"Annually" means once a year. The Form 486 was never intended to be and is not an annual form. The form is used to advise USAC that a service covered by a funding commitment has started and that it is okay, therefore, to begin paying the service provider's invoices for that service. It is important to keep in mind that services do not all start simultaneously; indeed services, especially the installation of internal connections, may begin at any time during the course of a funding year, which leads to multiple Form 486 filings. Nor do applicants necessarily receive all of their funding commitments for a funding year in a single funding commitment decision letter, which also leads to multiple filings. Furthermore, because of processing delays, appeals and for other reasons, some applicants receive funding commitments for earlier funding years in later funding years, further increasing the number of Form 486 filings those applicants have to make in those particular years. And finally, in addition to the applicants that have no choice but to file multiple times, there are plenty of applicants that do so voluntarily. Those are the applicants that opt, for their own administrative reasons, to file one Form 486 per service rather than listing them all on a single form. Together, all of these factors result in large numbers of applicants filing a Form 486 multiple times every year. Thus

while many applicants may file one Form 486 "annually," that is by no means a universal practice.[1]

USAC's administrative procedures require applicants to complete every annual certification that appears on the Form 486 every time they file the form, no matter how many times they may have done so already that year. This procedure forces applicants to repeat the exact same "annual" certification over and over, which is confusing at best. If an applicant fails or waits too long to do so, our understanding is that USAC will not fund or will reduce funding the commitments listed on the applicant's Form 486, depending on the circumstances.[2] But even if USAC were not to deny or reduce funding in those circumstances, what we know happens and happens repeatedly is that USAC winds up wasting valuable staff time contacting applicants to secure certifications that they have already made -- at least once before. This practice causes badly needed funding commitments to be delayed unnecessarily, makes the existing application processing bottleneck even worse and, quite frankly, makes little sense. This cannot possibly be what the Commission intended.

To remedy this, there are a variety of relatively simple solutions. The Commission could instruct USAC to have applicants submit their annual certifications as an attachment to one of their Form 471 applications, like it does now with their Form 471, Item 21 Description of Services, but this might be confusing too. Or, USAC's PIA staff could request that applicants provide their certifications during the application review process, which seems like it ought to be an easy process to implement and administer, since PIA staff already send out a variety of certifications for applicants to complete. Another option, the easiest one of all, would simply be to instruct USAC to

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[1] To help illustrate this point, we examined USAC's database, which shows that in FY2009, several thousands of applicants (20.7% of those filing) had applications that included both priority one and two requests on them. That the vast majority of those applicants will file separate copies of Form 486 for their P1 and P2 requests is, we believe, a fairly safe assumption, as basic telephone service would have started on day one of the funding year and P2 installations are more likely to occur later in the year.

[2] If an applicant makes a mistake and corrects it after the deadline for filing the form, the penalty can be substantial. It is important to note also that USAC reduces an applicant's funding for not filing a Form 486 within 120 days of the correct service start date. *See* NPRM at n.12.

instruct applicants that they need not complete the various certifications on the Form 486 more than once annually. Surely, USAC's systems are robust enough to be able to detect quickly and easily, before issuing a funding commitment, whether or not an applicant has already submitted the necessary annual certifications for that year. This solution is by no means perfect, as some applicants are still going to find a form like this one, which includes annual certifications on it, confusing. It does, however, represent a reasonable compromise and is likely the easiest solution for USAC to implement.

II. Guidance Is Needed On Whether USAC Should Be Using Part Of The Definition of "Schools" To Test The Eligibility Of Certain Educational Programs That Operate Routinely Inside Of Eligible School Buildings

The Commission is also seeking "comment on its proposal "to revise the rules so that the definitions of elementary and secondary schools are consistent throughout." We support this proposal because consistency and clarity are always important.

For the same reason, we urge the Commission to answer, for both USAC and the E-rate community at large, an important question that is closely related to the issue of school eligibility. The question is this:

> Once a school meets the statutory test for eligibility, are all of the eligible services provided to that school's building or buildings automatically eligible for E-rate support, so long as they also pass the educational purposes test, or do the rules require the school to pass additional eligibility tests too, as USAC claims?

As discussed in more detail below, we are asking the Commission this question because we believe that USAC has taken the definition of schools and used it derivatively and by mistake to manufacture other eligibility rules for which there is no legal foundation.[3] USAC apparently believes that, in addition to school eligibility, the rules

[3] *See, also*, Comments of Funds For Learning, LLC on DA 09-2376, Broadband Needs in Education, Including Changes to E-rate Program to Improve Broadband Deployment, CC Docket 06-02, *et al* (posted 11-23-09) at pp. 6-9

also include eligibility tests for programs and thus for students, creating in the process a class of ineligible users. It has been using this derivative interpretation of the rules either to reduce or deny funding to otherwise eligible schools, if their schools house any so-called "ineligible" programs. We believe that USAC has taken the "school" eligibility test much too far. While there may be some logic to applying the test in this derivative fashion, in the final analysis, there is no support for it in the rules. Until USAC is instructed to eliminate this administrative procedure, the consequences will continue to include lost funding, delayed funding and an incredible amount of wasted administrative time for everyone involved in the E-rate application process.

A basic tenet of the E-rate program is and always has been that any school that (1) satisfies the statutory definition of "school;" (2) does not operate as a for-profit school; and (3) does not have more than a $50 million endowment is eligible to receive E-rate discounted services, so long as it uses them for educational purposes. *See* § 54.501 of the Commission's rules. Therefore, contrary to USAC, we have always believed that <u>once a school passes the statutory eligibility test and shows that neither exemption applies, E-rate supported services for educational purposes may be purchased for and delivered to any room or space in that school's building(s).</u>

USAC, on the other hand, uses the school eligibility test set forth in the rules as simply a jumping off point. Long ago, USAC decided to extrapolate additional eligibility requirements from the simple, straightforward statutory test, thus adding an extra and entirely unnecessary layer of complexity to an already very difficult process. USAC believes that the test for eligibility is actually a two-part test, even though the rules make absolutely no mention of this. Under USAC's administrative procedures, the second part involves <u>testing every room, space, and student in an otherwise eligible school</u> for eligibility. That is, USAC wants to know whether any room or space in the school has, will or may be used, either on a full or part-time basis, for pre-kindergarten or adult education in states where that kind of education is not considered, respectively, either "elementary" or "secondary." If the answer is "yes," then USAC wants to know how many of those kinds of students attend classes at that school.

When a room or space in an otherwise eligible school building winds up in this category, USAC dubs it, along with the students who attend classes there, as "ineligible." USAC's next step, depending on the circumstances, is either to reduce or deny some funding to that school, even though the school has already established its statutory eligibility. USAC will take the number of "ineligible" students who happened to occupy the "ineligible" room or space on a particular day, compare it to the total number of "eligible" students also there that day and reduce proportionally the total amount of funding for telecommunications and Internet services that the school would have received if this were not an issue. If the school's application includes any requests for discounts on internal connections for the "ineligible" room or space, USAC will refuse to fund them.

Rooms and spaces inside schools are mutable. Necessity requires it. A music room one year may be a pre-school classroom the next, a media lab the year after that, and an adult education classroom the year after that. That so-called "ineligible" students may occupy rooms once occupied by eligible students and vice versa is a commonplace occurrence, especially in schools strapped for space. By itself, this fundamental fact of school life should have been enough to convince USAC that it never should have started applying the rules of eligibility in this broad a fashion, but unfortunately that has not been the case.

In our opinion, the eligibility determination procedure that USAC employs, which includes inquiries into program/student eligibility, is perched on a broader and far more complex interpretation of the term, "eligibility," than Congress or the Commission ever intended. Congress' concern was that universal service support be used only to support services delivered to schools that pass the statutory test. For good reason, neither Congress nor the Commission has ever shown any interest in taking the eligibility issue beyond the front door to the schoolhouse. How an eligible school decides to divide up and use its space is and should remain that school's business. USAC's job is to determine in the first instance, based on the evidence presented, whether the school is or is not eligible for E-rate support. If it is, that is where USAC's inquiry should end. In

other procedural contexts, USAC has used the term "binary" to describe a simple yes or no process. That term, we believe, describes this process perfectly, as a school is either eligible or it is not.

Whether a state considers a program like pre-kindergarten education to be "elementary" education, for example, is relevant for one purpose and one purpose only – i.e., to determine whether the non-profit organizations in that state that operate *stand-alone* pre-school programs are E-rate eligible "schools." Significantly, neither the statute nor the rules define the term, 'ineligible program." That is why there are no ineligible programs -- only ineligible schools. It follows logically, therefore, that once USAC has decided that a school is "eligible," questions such as whether, where, when, for how long and to how many students that school provides so-called ineligible programs is totally irrelevant for E-rate purposes. By spending time investigating this issue and reducing and denying funding as a result, USAC, we believe strongly, is not only operating outside of its mandate, it is wasting valuable administrative time -- time that USAC could be using to process applications and post-commitment paperwork much more quickly.

We thank the Commission for this opportunity to share our views and the benefit of our E-rate-related experience in connection with these important issues. We will be pleased to supplement these comments upon request.

Respectfully submitted,

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