

September 22, 2011

Jennifer L. Richter  
202-457-5666  
jrichter@pattonboggs.com

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: **Ex Parte Notice - Docket No. 02-6**  
**FY2012 Eligible Services List**

Dear Ms. Dortch:

Edline and the Wireline Competition Bureau (the “Bureau”) participated in telephone calls this week to discuss Edline’s revised suggested edits to the FY2012 draft Eligible Services List (“ESL”). The calls took place on September 20, September 21 and September 22. Participants for the first call were Gina Spade and Cara Voth of the Bureau; Jon Abrams, Chairman of Edline; Phil Gieseler, consultant to Edline; and Jennifer Richter of Patton Boggs, counsel to Edline. Participants in the latter two calls were Gina Spade and Jennifer Richter.

The conversations focused solely on Edline’s revised edits to the Internet Access section of the ESL, which were submitted to the Commission in an Ex Parte Presentation dated September 19, 2011. That Ex Parte Presentation is attached in full to this notice.

Respectfully submitted,

/s/ Jennifer L. Richter

Jennifer L. Richter  
Counsel to Edline

cc: Gina Spade  
Cara Voth

September 19, 2011

Jennifer L. Richter  
202-457-5666  
jrichter@pattonboggs.com

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: **Ex Parte Presentation - Docket No. 02-6**  
**FY2012 Eligible Services List**

Dear Ms. Dortch:

Edline and the Wireline Competition Bureau (the “Bureau”) have participated in a number of meetings during recent weeks about the FY2012 draft Eligible Services List (“ESL”). Ex parte notices of those meetings were filed on August 16, August 24 and September 2. Edline has listened carefully to the feedback of Bureau staff in these meetings. In response thereto, Edline offers revised, suggested edits to the ESL. Please find attached a comparison of the Internet Access section of the ESL (edits in **green** reflect FCC language that was simply **moved**, **red** reflects **deletion**, and **blue** reflects **addition**) and Drafting Notes that explain the edits.

All edits in the attached are intended to be helpful clarifications and corrections to the ESL. However, there are a few edits and corresponding Drafting Notes that are the most critical for the Bureau to consider because they address language in the draft ESL that implicates some of the most common functions of web hosting and, therefore, present the most potential for confusion. The most important edits and Drafting Notes are **highlighted in yellow** in the attached and include the following:

- (1) **Content editing**: In order to clarify that end users can edit the content on their websites through a web interface, and to clarify that vendor content editing and vendor provided services to design a website are not permissible, Edline provides clarifications to the definition of web hosting, and specific exclusions to eligibility, in order to make more clear what is intended to be ineligible as “content editing.” (See Drafting Notes 3 and 8)
- (2) **Password Protection**: New language regarding password protection was added to the ESL that directly contradicts the Commission’s 2009 Order on password protection. Verbatim Commission language from the 2009 Order was substituted. (See Drafting Note 4)

Ex Parte of Edline  
September 19, 2011  
Page 2

(3) **Disparate Treatment of E-mail and Webhosting in the ESL:** There are a number of ways in which the ESL does not treat e-mail and webhosting with technology neutrality and competitive neutrality, including placement of the services in different “functions” by incorrectly asserting that e-mail is closer to the conduit than web hosting (See Drafting Note 5), failure to include web hosting in an exception that should apply to both e-mail and webhosting (See Drafting Note 7), and a generally unworkable and unfair approach to describing what is ineligible for web hosting (See Drafting Note 9).

We believe Edline’s suggestions, in total, provide greater clarity about what is eligible and ineligible, accurately implement past Commission decisions, and remove ambiguity and contradictions in the ESL. Edline looks forward to continuing to work with the Bureau staff on these issues and to bring this matter to a conclusion.

Respectfully submitted,

/s/ Jennifer L. Richter

Jennifer L. Richter  
Counsel to Edline

cc: Gina Spade  
Cara Voth  
James Bachtell  
Alec MacDonnell  
Abdel Eqab

## Internet Access Eligibility Requirements for All Internet Access Services:

**Internet access**, ~~See 47 C.F.R. § 54.5, includes the following elements:~~

- ~~(1) The transmission of information as common carriage;~~
- ~~(2) The transmission of information as part of a gateway to an information service, when that transmission does not involve the generation or alteration of the content of information, but may include data transmission, address translation, protocol conversion, billing management, introductory information content, and navigational systems that enable users to access information services, and that do not affect the presentation of such information to users; and~~
- ~~(3) Electronic mail services (e-mail).~~ [DRAFTING NOTE 1]

Support in this funding category is generally only available for basic conduit access to the Internet but is not available for content, equipment purchased by applicants, and services beyond basic conduit access to the Internet, except as expressly provided herein. Support may also be available for selected services that are an integral component part of an Internet Access service, and other services that the Commission has designated as eligible for discounts.

Maintenance and technical support appropriate to maintain reliable operation is eligible for discount when provided as a component of an eligible Internet access service. Please see the Miscellaneous section of this document for additional entries applicable to Internet Access, such as charges for installation and configuration.

~~Function~~

~~Description~~

### Internet-Based Interactive Communications Services

The following interactive, Internet-based services are eligible:

#### Email Service.

E-mail service is eligible. E-mail service is often included in the cost of basic conduit access to the Internet or may be provided at a separate cost, either as a fixed charge and/or on a per-user or other basis.

Some e-mail services may include substantial ineligible features, such as collaboration tools, and services to ineligible users. Funding is limited strictly to the eligible portion of an electronic mail service (i.e., the part of the service that provides for the transmission of ~~text~~ messages and other information). E-mail archiving is not eligible for discount.

[DRAFTING NOTE 2]

## Web hosting service. [DRAFTING NOTE 3]

Web hosting service provides a means for a school or library to communicate content on the Internet for the public or school stakeholders (students and parents, teachers and staff). Eligible web hosting services facilitate communication as their primary purpose and use. When included with a web hosting service, interactive communication features, such as blogging, webmail, instant messaging, and chat, are eligible.

An eligible web hosting service provides schools and libraries: 1) the ability to store applicant provided content, 2) a web interface for transferring information, and 3) the bandwidth access that allows schools or libraries to display their web pages. We clarify that web pages protected by a username and password are eligible for funding as part of web hosting services. The fact that a school or library restricts access to all or part of its website to certain users—e.g., school administrators, teachers, librarians, students and parents—does not render the service ineligible for E-rate funds. [DRAFTING NOTE 4]

## Internet Basic Conduit Access to the Internet

Basic conduit access to the Internet is eligible regardless of technology platform.

Access technologies include but are not limited to:

- Broadband over Power Lines (BPL)-enabled Internet access service
- Cable Modem
- Digital Subscriber Line (DSL)
- Fiber
- Satellite service
- Telephone dial-up
- T-1 lines
- Wireless

Eligible Internet access may include features typically provided for when provided as a standard component of a vendor's Internet access service. Such features may include Domain Name Service, Dynamic Host Configuration, and basic firewall protection against unauthorized use and access. Firewall protection may not be provided by a vendor other than the Internet access provider and may not be priced out separately.

Basic conduit access to the Internet may be used to access Internet-based distance learning and video conferencing services.

A wireless Internet access service is eligible under the same provisions as wired access to the Internet.

A Wide Area Network can be eligible for funding as a part of Internet access if the service is limited to basic conduit access to the Internet and the offering is the most cost-effective means of accessing the Internet.

A wireless Internet access service designed for portable electronic devices is eligible if used for educational purposes and the off-campus use is removed by cost allocation. Applications (including GPS) for wireless devices are not eligible for discount. Service/Data charges dedicated solely to the provision of these applications are not eligible and require cost allocation.

Mobile hotspot service designed for portable electronics is eligible if used for educational purposes, if off-campus use is cost-allocated, and when service is not duplicative of other wireless Internet access service. Hardware costs of the mobile hotspot embedded in or connected to the end-user device are not eligible.

## Internet – Related Services

These services may be purchased separately or as part of a bundled Internet access service.

- Interconnected Voice over Internet Protocol (the regulatory classification of interconnected VoIP service does not affect the inclusion of this service as an eligible service in this category)
  
- Lit or (see Telecommunications category)
- Web hosting service provides a means for a school or library to display content on the Internet for the public or school stakeholders (students and parents). An eligible web hosting service provides schools and libraries: 1) the ability to store applicant provided content, 2) a web interface for uploading files, and 3) the bandwidth access that allows schools or libraries to display their web pages. Password-protected pages are allowed to prevent full public access, but must be available to students or their parents at a minimum (password-protected pages for a library would be for patrons of that library). Password-protected pages will NOT be eligible if established exclusively for librarians, administrators, school officials or teachers to access ineligible tools. When included with a web hosting service, interactive communication features, such as blogging, webmail, instant messaging, and chat, are eligible. [DRAFTING NOTE 5]
  
- Domain name registration is eligible if it is necessary for the creation of a school or library website.

## NOT Eligible for E-rate Funding as Internet Access Services

The following services are **NOT ELIGIBLE** for discount:

- Services that go beyond basic conduit access to the Internet, such as Virtual Private Network services (except that, for purposes of clarification, e-mail services and web hosting services, which go beyond basic conduit access, are eligible)
- Online Backup Solutions
- Charges for Internet content [DRAFTING NOTE 6]
- Software, services, or systems used to create or edit Internet content or charges for the creation of information. Internet access that provides features or content that go beyond basic conduit access to the Internet. (E-mail service and e-mail account fees, and web hosting service, however, are not considered “software, services or systems used to create or edit Internet content.” and are eligible even though they extend beyond basic conduit access). [DRAFTING NOTE 7]
- Applicants may accept an Internet Access service with minimal content included if the content meets the limitations for Ancillary Use. See Special Eligibility Conditions below for further information on Ancillary Use.)
- Costs attributable to the creation or modification of information, such as a web site creation fee or content maintenance fees.
- Vendor content editing or professional / consulting services to design and provide the content for a school's website. [DRAFTING NOTE 8]
- ~~Web hosting features and applications. Any web hosting features, software applications, end user file storage, and content editing features beyond 1) the storage of applicant provided content, 2) a web interface for uploading files, and 3) the bandwidth access that allows schools or libraries to display their web pages are NOT eligible. This does not include password protected pages, the features that facilitate the ability to communicate (e.g., blogging, e-mailing over a school or library's hosted website, and discussion boards) and services that may facilitate real-time interactive communication (e.g., instant messaging or chat) when these are included in a web hosting service.~~ [DRAFTING NOTE 9]
- Services or systems that do not facilitate web-based communication as their primary purpose and use, including student data systems, teacher grading software, or for-charge online curriculum, are not eligible. [DRAFTING NOTE 10]
- ~~Examples of ineligible web hosting features and applications include, but are not limited to: 1) Third party—~~ [DRAFTING NOTE 11]

- Third-party created content including, videos, recorded classes, online textbooks, curriculum or educational software programs, or other content or curriculum created and packaged by third party vendors; ~~2) Any features related to school/library administration or school/library operational functions such as the capabilities for data input or retrieval (e.g., searching of databases for grades, student attendance files, or other administrative reports) and 3) Applications or software for collaborative meetings or on-line classes.~~
- School/library administration or school/library operational systems such as student information systems, gradebooks or grading systems, financial systems, or student attendance management systems.
- Charges for ~~distance learning or~~ video conferencing utilities, ~~such as web meetings or online collaboration solutions~~ or live web conferencing, even if provided via the Internet. [DRAFTING NOTE 12]
- Internet2 membership fees
- Training regarding the use of the Internet
- Costs for training provided via the Internet
- A point-to-point connection (e.g., ISDN line) for distance learning or video conferencing is NOT eligible as Internet Access and may only be provided by telecommunication carriers (unless it is provided via fiber or dark fiber).
- Electronic library/on-line public access and associated software
- Applications (including GPS) for wireless devices are not eligible for discounts. Charges for Internet access service used solely for the provision of these applications are also not eligible.

Separate pricing for the following components when not included in the standard configuration of an Internet access service is **NOT ELIGIBLE**:

- Caching
- Content filtering
- Web Casting

Please see the Miscellaneous section of this document for additional entries applicable to Internet access. For example, finance charges and termination charges are not eligible.

## **EDLINE'S DRAFTING NOTES**

**NOTE 1:** A 15-year-old definition of Internet access should not be perpetuated in the ESL. Bureau staff and Edline discussed USAC's proposed addition of the 1997 definition of Internet Access to the FY2012 ESL. This outdated definition, codified in Section 54.5 of the FCC rules, was based on "what electronic publishing was not" and does not accurately depict or clearly describe the Internet as it exists today. While this old definition may be in the FCC rules, it should not, at this time, be perpetuated and further promoted in the E-rate community by adding it the FY2012 ESL. This new addition to the proposed FY2012 ESL is confusing and should be removed. One of the principle problems with the definition is that it can be misinterpreted to suggest that e-mail accounts are a part of basic conduit access, which they are not. This distinction then results in different placement and treatment for e-mail service versus web hosting service in the ESL and leads to anticompetitive results.

**NOTE 2:** A focus on text communication no longer aligns with the broad types of communication now taking place with e-mail service. HTML and graphics are commonplace for all e-mail and have been for many years. This definition is no longer technically accurate.

**NOTE 3:** Three important clarifications are made to the definition of web hosting. First, teachers and staff are clearly stakeholders / users of webhosting services and were added to the list of users along with parents and students. Second, a limitation was added that web hosting services must "facilitate communication as their primary purpose and use" in order to be eligible. This additional limitation on eligibility simply and easily eliminates many categories of software and services that are "web-based" or use a "web-interface" but are not used primarily for communication and are clearly not eligible (e.g. financial systems, student data systems, or curriculum). Third, the ESL must reflect the Commission's finding in paragraph 101 of the *Sixth Report and Order* that websites are not static.<sup>1</sup> They are not simply repositories for pages that are created offline and uploaded later for display. Websites are dynamic communications tools. Accordingly, language in the definition of web hosting that continues to view websites as static was changed. For example, eligibility to "display content" was changed to "communicate" content, and eligibility for "uploading files" was changed to "transferring information."

**NOTE 4:** The ESL contradicts the Commission's 2009 decision on password protection, and this must be fixed. Edline's suggested edit regarding password protection includes verbatim language from the Commission's decision on password protection.<sup>2</sup> It is not correct to suggest, as the proposed 2012 ESL does, that students and parents must have access to password-protected pages. Students and parents may have access to some, but not all, features of a web hosting service. For example,

---

<sup>1</sup> *Sixth Report and Order*, ¶101 ("This decision alters prior decisions limiting web hosting support to hosting a school or library's static website and excluded the ability to engage in interactive activity such as blogging.")

<sup>2</sup> *Schools and Libraries Universal Service Support Mechanism, Report and Order and Further Notice of Proposed Rulemaking*, 25 FCC Rcd 6562, ¶22 (2009) ("2009 Order")

students and parents would not have access to communications restricted to teachers, or to administrator-only pages. The 2009 Order recognized this: “The fact that a school or library restricts access to all or part of its website to certain users – e.g., school administrators, teachers, librarians, students and parents – does not render the service ineligible for E-rate funds.”

**NOTE 5:** The ESL separates e-mail and web hosting services into two different “functions,” but there is no technical or policy justification. In the *Sixth Report and Order*, the FCC found that e-mail, websites, and web hosted communications tools such as discussion boards, blogs and text messaging are functionally equivalent because they are all “services that facilitate the ability to communicate.”<sup>3</sup> The Commission’s finding of functional equivalence between eligible e-mail and eligible web hosting services is supported in numerous respects (see page 3 of Edline’s Ex Parte Notice of August 24), and demonstrates an important recognition of the ongoing convergence of e-mail, websites and related web hosted communications. In the ESL, E-mail is contained in a more general Internet Access section, and web hosting is placed in an “Internet Related Services” section with the justification that it does not provide conduit access to the Internet. However, neither e-mail nor web hosting provides conduit access, and neither is closer to the conduit than the other. This difference in treatment is unwarranted. The ESL needs to treat these similarly-situated, functionally-equivalent services in a fair, consistent and neutral manner, which is required by the FCC’s core principles of technology neutrality (preferential treatment cannot be given to one form of electronic communication over another) and competitive neutrality (similarly-situated services must be treated in the same manner). Edline suggests placing the two services in the same “function” category.

**NOTE 6:** The ESL should make clear that “Charges for” Internet content are ineligible, not Internet content itself. Edline and the Bureau discussed that charges for content, such as online curriculum or information services, are ineligible. Declaring “Internet content” ineligible is overly broad and vague, and incorrect. Certainly the content displayed in webmail, or on a school’s website, is technically speaking “Internet content” and, as an integral component of these services, must be eligible.

**NOTE 7:** The proposed ESL notes as ineligible: “Software, services or systems used to create or edit Internet content,” or “charges for the creation of information.” Also ineligible is: “Internet access that provides features or content that go beyond basic conduit access to the Internet.” This language is followed by a parenthetical that makes an exception for e-mail services: “(E-mail service and e-mail account fees, however, are not considered Internet content.)” This same exception should apply to web hosting services – web hosting services are not considered Internet content – and yet no exception is made. This difference in treatment is unwarranted. Competitive neutrality and technology neutrality require the same treatment for both e-mail service and web hosting service. Edline’s suggested edit includes web hosting in the exception. Beyond this simple change, as the Bureau is aware, software is a component of, and inherent in

---

<sup>3</sup> *Schools and Libraries Universal Service Support Mechanism, A National Broadband Plan for Our Future, Sixth Report and Order*, 25 FCC Rcd 18762, 18806 ¶101 (2010) (“*Sixth Report and Order*”).

all e-mail services and web hosting services, and cannot be broadly cast as ineligible. E-mail and web hosting services are designed as integrated solutions that include computers, access to the Internet and enabling software.

**NOTE 8:** After discussions with Bureau staff, we believe this addition to the exclusions for eligibility, together with the ineligibility of “content” itself, encompasses what is meant by ineligible “content editing.” Using these exclusions will eliminate any confusion about “content editing” and the ability of end users to utilize a web interface to interact with and edit their web site and use their interactive web hosting communications tools.

**NOTE 9:** How the proposed 2012 ESL treats “ineligible” features for e-mail and web hosting is inconsistent and, again, violates competitive neutrality and technology neutrality. For e-mail, the ESL simply states what is eligible and states that funding is limited to what is eligible. The introduction to the entire ESL explains that whatever is not described as eligible is ineligible: “funding is limited to those products and services expressed as eligible in the ESL.”<sup>4</sup> Yet, for web hosting, the proposed ESL states both what is eligible and then in a separate section uses the same language, in the negative, to indicate that everything not specifically listed in the three-part definition of web hosting is ineligible. This is a disparate and more onerous approach than the approach taken for e-mail, and it is unnecessary given the introductory language to the ESL. Web hosting, like e-mail, inherently includes many more features than those that can be captured in a general three sentence description and, thus, this approach is unworkable, unreasonable and unfair. This difference in treatment is unwarranted.

**NOTE 10:** This is an additional limitation on or exclusion from eligibility for web hosting. This additional limitation easily eliminates many categories of software and services that are “web-based” or use a “web-interface” but are not used primarily for communication and are clearly not eligible (e.g. financial systems, student data systems, or curriculum).

**NOTE 11:** The items listed are not “features” of web hosting.

**NOTE 12:** The terms “distance learning” and “online collaboration” were deleted because they have no specific technical definition and are therefore too broad and vague. These terms are more akin to descriptions of what users do with technology tools, rather than actual tools or services themselves. Schools and libraries can conduct “distance learning” with a simple and eligible blog and teacher page, or with a full-featured suite of ineligible tools such as online quizzes, gradebooks, and other applications. A group of teachers or students can “collaborate” via webmail, or with advanced video conferencing and web conferencing. If the draft ESL wishes to exclude video conferencing and web conferencing, it should avoid vague statements about “collaboration” or “distance learning.”

---

<sup>4</sup> Wireline Competition Bureau Seeks Comment on Draft Eligible Services List for Schools and Libraries Universal Service Program, *Public Notice*, 26 FCC Rcd 8714, 8721 (2011) (Draft ESL at p. 1).