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

In the Matter of	)	
Modernizing the E-Rate Program for Schools and Libraries	)	WC Docket No. 13-184

Comments of the New York State Education Department Regarding the Further Notice of Proposed Rulemaking (FCC 14-99)

The New York State Education Department ("NYSED") submits these Comments in response to the FCC's Report and Order and Further Notice of Proposed Rulemaking released July 23, 2014, designated FCC 14-99, seeking comment on additional changes necessary to modernize the E-rate program.

Table of Contents

Introductory Comments and Summary 2
Future E-Rate Funding Needs 2
Multi-Year Contracts 5
NSLP Data Collection 6
Encouraging Consortium Participation 7
Library Support 8
Conclusions 8

Introductory Comments and Summary

NYSED wishes to express its strong support for the E-rate program and for the efforts made on its behalf by the Federal Communications Commission ("FCC") and the Universal Service Administrative Company ("USAC"). From the program's inception through the present, New York State E-rate applicants have been awarded funding of $4.4 billion in E-rate discounts. This funding has permitted New York schools and libraries to purchase and install technology and telecommunications equipment and services that otherwise would have been far beyond their financial capabilities. Even for our lower discount applicants, not historically qualifying for Internal Connections, we have seen how E-rate has encouraged early adoption of broadband Internet and other services.

New York welcomes the opportunity afforded by the FCC to contribute to efforts being made to modernize and further strengthen this valuable program.

The following are the key points made in these comments:

- The most important need is to meet Category 2 funding requirements early in FY 2015 and FY 2016. Options, in addition to increasing the funding cap, include taking advantage of the ADA exemption and/or to providing advanced funding commitments.
- The eligibility of multi-year contracts should not be constrained by nominal contract expiration dates.
- Consortium discount rates should be based on simple averages. Guidance and education is needed to ensure proportionally discounted benefits to all consortium members. Consortium eligibility for incentive discounts, if provided, should be based on state-defined consortium standards.
- Applicants should be permitted to provide up-to-date data on student eligibility percentages for discount rate determination.
- The square foot Category 2 budget mechanism for libraries is consistent with the per student budget mechanism for schools.

Future E-Rate Funding Needs

NYSED recognizes that the adequacy of E-rate funding has been a source of concern, not only within the broader E-rate community, but within the Commission itself. The recent E-rate

modernization Order represents a reasonable compromise within current funding constraints to refocus the program on broadband. It provides sufficient Category 1 funds to support connectivity to schools and libraries while, at the same time, providing significant Category 2 funding for intra-building connectivity. NYSED agrees that connectivity, both to and within applicant sites, go hand-in-hand.

Historically, E-rate has been able to fund broadband connectivity to schools and libraries at all discount levels. The missing piece has been the funding of internal networks — particularly in FY 2013 and FY 2014, and previously for most lower-discount applicants. The new Order's provisions to provide Category 2 funding, on the order of $1 billion per year over the next five years, is an important step in the right direction for applicants at all discount levels.

NYSED questions, however, whether this funding target is a large enough — and a timely enough — step in this direction. Given the lack of Priority 2 funding in past years, NYSED believes that more Category 2 funding is needed earlier in the E-Rate 2.0 era. In particular, NYSED notes;

1. The per-school and per-library budget caps represent the FCC's conservative estimates of the average costs of Wi-Fi system implementations over a five-year period. Although such funding comes in welcome contrast to no or limited Priority 2 funding in recent years, it may not be enough to cover the above average Wi-Fi costs of many applicants.
2. $1 billion in Category 2 funding, in both FY 2015 and FY 2016, is likely to be available to only the highest discount applicants — many of whom had been receiving Priority 2 funding prior to FY 2013.
3. Lower discount applicants are likely to be shut out of Category 2 funding until FY 2017 or later — even assuming that the FCC acts to extend its Category 2 budget mechanism beyond FY 2016.

NYSED recognizes that increasing the E-rate cap — perhaps by $800 million per year, as some propose — would provide additional Category 2 funding in the early years. Although NYSED would support this increase, it believes that even more funding is needed in FY 2015 and FY 2016 to ensure that all schools and libraries have the resources — and the certainty of

receiving those resources — to plan for and meet the ConnectEd connectivity goals over the next five years.

Regardless of whether the FCC's five-year Category 2 funding target is $5 billion, or whether the target could be increased by raising the annual funding cap, NYSED encourages the FCC to establish funding mechanisms that would accelerate funding commitments for all applicants in FY 2015 and/or FY 2016. There are at least two mechanisms the FCC should consider to accelerate funding.

One alternative for awarding earlier funds would be to take advantage of the ADA exemption. On an annual or bi-annual basis, Congress has long exempted USF from the Anti-Deficiency Act, thus allowing USAC to over-commit funding in a given year based on (a) future USF collections, and (b), particularly for E-rate, the recognition that actual disbursements of awarded funding typically trail awards by one year or more. Utilizing the ADA exemption would likely permit the FCC and USAC to commit on the order of $4-5 billion in additional Category 2 funds over the next two years.

NYSED recognizes that the success of this strategy would require continued Congressional authorization of the ADA exemption. As it currently stands, *Section 302* of the *Universal Service Antideficiency Temporary Suspension Act* is in force through December 31, 2015. This would only cover timely awards for FY 2015. The Congressional history of ADA exemption extensions, however, suggest that another extension may be expected — indeed, might be more likely to be extended for a longer period, if it became clear that the ADA exemption is actually being used.

Another alternative to providing earlier assurances of funding — albeit one that would require a rule change — would be to (a) permit applicants to request Category 2 funding as early as FY 2015, (b) have USAC review and approve those requests for FY 2015 or later, but (c), schedule actual payments on related discount invoices only as funding becomes available in later years. Effectively, this would permit applicants to install or upgrade their Wi-Fi systems now, as needed, knowing that funding, while possibly delayed, had been approved.

Although this alternative may appear novel, NYSED notes that the FCC has effectively established an "install now/get paid later" approach in its existing Order by giving yet-to-be-funded applicants the ability to install Wi-Fi systems as early as April 1st of the preceding funding year. To applicants dependent on E-rate funding, the early installation option is feasible only if those applicants can be reasonably assured that they will in fact be funded in the ensuing funding year. What NYSED is suggesting— albeit less preferable to the ADA exemption alternative — is an "approve first/install when ready/get paid later" option that provides better longer-term planning and payment options.

Multi-Year Contracts

For purposes of application review of multi-year contracts, the FCC may properly wish to limit the number of consecutive years for which a contract qualifies for expedited treatment without being re-reviewed in more detail. But NYSED urges the FCC not to set a term limit on the eligibility of the contract itself. In part, this recommendation is based on the somewhat problematic definition of a contract's expiration date. In particular, NYSED notes:

1. New York State's master contracts, administered by the Office of General Services ("OGS") are often multi-vendor awards establishing broad terms and conditions. Use of many of these awards typically requires "mini-bids" and results in individualized agreements between vendors and customers. These "agreements" may specify termination obligations separate from the underlying OGS contract expiration date. Specifically, most of the awards under the NYS OGS Statewide "Comprehensive Telecommunications Equipment & Solutions" contract were first established in 2009 and do not expire until March 17, 2024.
2. Conversely, a number of connectivity contracts in New York, bid by consortia on behalf of their members, carry expiration dates by which the members can request services at the contractual prices. But services, when installed, may be subject to termination charges for minimum service periods (typically 36 or 50 months for connectivity services) extending beyond the underlying contract termination dates.

3. Fiber connectivity contracts, particularly for new construction, can involve two (or more) pricing stages. In such cases, the first stage typically has a higher-priced recurring cost, based on a capital-recovery business case; the second stage often has a lower-priced recurring cost based on ongoing maintenance requirements.

NSLP Data Collection

NYSED understands the FCC objective of simplifying the collection and review of student eligibility data, and notes that the FCC has already taken steps in this directions in the E-rate modernization Order by, for example, (a) adopting the 1.6x multiplier for CEP schools, and (b) eliminating the extrapolation factor on applicant income surveys. On the other hand, NYSED recognizes that the calculation and documentation of student eligibility data is necessarily more complex for certain applicants than for others.

One complication is that not all schools are full participants in the regular NSLP program. Even within a single district, some schools may use NSLP, some may use CEP, and some may use neither. To require some schools to use standardized, and possibly outdated, FNS-reported data, while other schools can use more selective alternative methods, seems inherently unfair.

Fairness is a particularly important measure under the FCC's new discount rate methodology by which districts are required to calculate overall matrix discounts based on total student data. Under this approach, discount rates for many applicants may actually be less sensitive to eligibility variations between different data sets. For such applicants (and their USAC reviewers), use of state-reported data as of a point in time, may indeed simplify discount rate calculations (and validations).

In the case of other applicants, however, minor variations in student eligibility data — as little as one eligible student one way or the other — may change a discount rate by 10-20%.[1] In these cases, NYSED believes an applicant should have every right to document and use data supporting a higher discount rate.

[1] In the case of the availability of Category 2 funding thresholds within a discount rate band, differences in actual student eligibility percentages may affect whether <u>any</u> funding is available or not.

Encouraging Consortium Participation

NYSED agrees that there are significant benefits to the use of consortia in the planning, bidding, implementation, and overall cost-effectiveness of broadband connectivity projects. With respect to the key consortium issues raised in the FNPRM, NYSED believes the following:

1. NYSED agrees that the use of a student-weighted average consortium discount rate may more accurately reflect a consortium's actual rate, but we do not believe that the added complexity — including the proposed library square foot student equivalent calculation — justifies, or offsets, the simplicity of a simple average. This is particularly true at this stage of the run-up to the FY 2015 application window.
2. NYSED agrees consortium benefits should be attributed back to its members in proportion to their individual discount rates.[2] We note, however, that USAC has never provided any guidance on the proper way to so allocate discounts, nor, to our knowledge, have audits gone beyond assuring that payments were made to a consortium as a whole. Guidance on the proper allocation of discount payments received or realized must reflect the understanding that consortium members should receive their proportionate share of the total discount that, because of the averaging nature of consortium discounts, may be somewhat higher or lower than implied their actual discount percentages.
3. Should the FCC decide to provide an extra discount percentage to broad based consortia, defining the eligibility for such consortia would be critical. The Education Coalition's criteria for defining such consortia would not work well for New York where there is no statewide network. Instead, New York relies on regional networks driven by BOCES and or RIC consortia. If incentive discounts are provided for specific consortia, NYSED suggests that eligibility for those incentives be based on state-by-state criteria set by the state education departments, much like USAC relies on states to define eligible educational service agencies ("ESAs").

[2] This principle assumes that the individual members are actually being charged for consortium services. The FCC should clarify that this is not an issue in situations in which the consortium (e.g., a state) is covering the ultimate costs of the service.

Library Support

NYSED is comfortable with the Category 2 budget mechanism included in the E-rate modernization Order based on $2.30 per square foot. Although this number was established as an average, as discussed above, and may not be high enough for all New York libraries, it is deemed reasonable equivalent to the $150 per student utilized for schools.

Conclusions

E-rate is a valuable program, not only for the schools and libraries involved, but for the nation as a whole. NYSED commends the Commission and its staff for its diligent efforts modernize the E-rate program and to address the vexing issues of E-rate program funding and complexity. As discussed throughout, however, we encourage the Commission further modify its recent Order to assure adequate Category 2 funding in the near term, and to avoid limitations on multi-year contracts, NSLP reporting, and consortia.

Respectfully Submitted by:

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