



August 25, 2005

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Comments on Draft Eligible Services List (FCC-05-158), CC Docket 02-6

Dear Ms. Dortch:

The State E-rate Coordinators' Alliance (SECA) submits these Comments in accordance with the August 15, 2005 Public Notice (FCC 05-158) which invites interested parties to file comments on the Universal Service Administrative Company's (USAC or Administrator) draft eligible services list. SECA operates without any staff, and accomplishes its work through the resources of its individual members who provide statewide E-rate coordination activities in 43 states and territories. Representatives of SECA typically have daily interactions with E-rate applicants to provide assistance concerning all aspects of the program. SECA provides face-to face E-Rate training for applicants and service providers and serves as intermediaries between the applicant and service provider communities, the Administrator, and the Federal Communications Commission (FCC or Commission).. In 2004, SECA members together provided more than 1300 hours of E-rate training workshops to E-rate applicants and service providers. Further, several members of SECA work for and apply for E-rate on behalf of large, statewide networks and consortia that further Congress' and the FCC's goals of providing universal access to modern telecommunications services to schools and libraries across the nation.

In addition to the roles as State E-rate trainers and coordinators, most SECA members also provide the following services to the program: technology plan approval; applicant verification assistance to the Administrator's Program Integrity Assurance (PIA) Division; verification to the Administrator of applicable state laws confirming eligibility of certain applicant groups; contact of last resort to applicants by the Administrator; and verification point for free/reduced lunch numbers for applicants.

Hence, SECA members are thoroughly familiar with E-Rate regulations, policies and outreach at virtually all levels of the program.

We write to provide comments on the Commission's Draft E-rate Eligible Services List, specifically on the following topics:

- Removal of Telecom/Internet Bundle Filing Option
- Wireless Internet and E-mail Access
- Webhosting Services Clarification

Removal of Telecommunications/Internet Bundle Filing Option

The draft Eligible Services list includes the following language:

"NOTE CONCERNING COMBINED TELECOMMUNICATIONS AND INTERNET ACCESS SERVICES: Some service offerings from service providers include a combination of

Telecommunications Services and Internet Access. For example, a service provider may provide a combined offering of local phone service, long distance service, cellular service, and Internet Access for one price. Such a combined offering must be featured in both the Telecommunications Services and Internet Access categories of service on the FCC Form 470. Applicants must also divide the price of the offering appropriately between a Telecommunications Services funding request and an Internet Access funding request on the FCC Form 471. Remember that only Telecommunications Carriers can provide Telecommunications Services, and that applicants submitting requests for Internet Access must comply with requirements of the Children’s Internet Protection Act (CIPA).”

In essence, this new language could be construed to require that whenever a Telecommunications Carrier uses its telecommunications service to provide an Internet access service for a single price – a practice which is commonplace in the market, applicants will be required to separate the telecommunications transmission component of the service from the Internet access component of the service and file two separate funding requests. This outcome would be exceptionally onerous and administratively burdensome to applicants and service providers alike and SECA opposes such a requirement. The Commission and Administrator should recognize the reality of market practices and allow applicants and telecommunications carriers to continue to bundle Internet access and telecommunications services as a single FRN – especially if the services are sold as a single combined offering.

Based on our experience, SECA is aware of the following kinds of bundled services being marketed to E-rate customers:

Telecommunications Carrier Bundles Telecommunications and Internet Access Service

It is common for telecommunications providers to provide a WAN telecommunications service (such as a T-1 line), along with basic Internet access. In this case, the applicant typically files a Form 470 and lists “high speed internet access” under the telecommunications category. Wise applicants who have received counseling or learned the hard way from a funding denial due to a “wrong category” gotcha¹ they will list the service under both the telecommunications and Internet access categories for safe measure. Typically, telecommunications providers package “high speed internet access” and offer one flat rate to the school or library. The applicant then usually files a Form 471, listing the bundled service in the Telecommunications Service category in a funding request because it is widely known that if a bundled service is offered by a Telecommunications Carrier (also referred to by USAC as an Eligible Telecommunications Provider) all uses of the service (both telecommunications and Internet access) are considered eligible, including voice, data, video telecommunications and Internet access.

Non-Telecommunications Carrier Bundles Telecommunications and Internet Access Service

In other situations, a non-telecommunications carrier (without common carrier status or possessing a certification/authorization from the FCC or a state regulatory commission to provide telecommunications services on a common carriage basis) also may package bundled Internet access service with telecommunications service. In this situation, the non-telecommunications carrier leases telecommunications services from a Telecommunications Carrier and bundles the leased service with its own facilities to provide an end-to-end Internet access service. In this situation, the applicant typically files a Form 470 and lists “high speed Internet access” to request bids under the Internet access service category, and may or may not also seek bids in the telecommunications category of service. The non-telecommunications carrier packages the “high speed internet access” and offers one bundled charge to the school or library. The applicant then usually files a Form 471, listing under the Internet Access category. According to FCC precedent, the non-telecommunications carrier’s *use* of telecommunications in the provision of Internet access service is legally distinguishable from the *provision* of

¹ The “wrong category” gotcha refers to funding denials because the applicant requests a FRN for Internet access service on its form 471 but only listed telecommunications services on its Form 470 (and did not also request bids for Internet access).

telecommunications services, and the non-telecommunications carrier's service is properly classified as Internet access service.

A challenge for the Administrator arises, however, when Internet access is classified as telecommunications service because the Administrator is unable to insure that the applicant is compliant with CIPA. The FCC's CIPA rules, released on April 5, 2001, require recipients of E-rate discounts for Internet access and/or internal connections to comply with CIPA, but do not require applicants who solely receive discounts on telecommunications service to comply with CIPA. While the proposed approach requiring unbundling of funding requests for Internet access and telecommunications services is one way to solve this operational challenge, this solution places an undue burden on applicants and service providers. A preferable solution, which will accomplish the same objective to enable the Administrator to be able to more readily insure CIPA compliance, is for the FCC to clarify that regardless of whether the funding request is classified as Internet access or telecommunications, any applicant that will use E-rate funds to obtain Internet access must be CIPA compliant.

When the Commission issued its April 2001 CIPA rules, the FCC tried to maximize applicants' flexibility for complying with CIPA and in doing so, determined that only recipients of services in the "Internet Access" (and internal connections) category were required to be CIPA compliant. In reality, the rules should have stated that any recipient of discounted Internet services, regardless of funding category, should be required to comply with CIPA. By clarifying this rule, instead of imposing the onerous unbundling requirement proposed in the draft eligible services list, the original intent of the Commission's directive would remain intact (that CIPA compliance would be related to Internet Access and not to Telecommunications Services); the Administrator would be able to apply this clarification to effectively insure CIPA compliance, and at the same time, the marketplace reality of bundled Internet access with telecommunications services would be able to remain intact.

The Internet bundle is not simply an "administrative convenience" as stated on the currently effective eligible services list (dated October 27, 2004). It is a marketplace reality. If this option is revoked, service providers will not simply start unbundling their service offerings because small providers, and many larger providers as well, do not rely on E-rate to drive their business and pricing models. Schools and libraries would be severely injured as a result of this policy sea change, because their applications would be denied funding for failure to list the proper service in the proper category on one of the E-rate forms, or both. Moreover, we can easily anticipate the situation where an applicant inadvertently fails to separately request Internet and telecommunications services in separate funding requests. The Administrator could very well choose to apply the 30% rule in this situation, which would further exacerbate the denial rate.

We already see numerous denials on an annual basis because an applicant lists "high speed internet access" in the telecommunications category, but when they review their service options, they realize the only company offering services is a non-telecommunications carrier, and therefore, the applicant's only option is to classify the funding request as Internet access service. When PIA discovers that the 470 and 471 categories do not match, the funding request is denied. These denials are only a tiny fraction of the denials we would see if the Internet bundle option is removed.

In addition, hundreds, if not thousands, of applicants are in the middle of multi-year contracts that were competitively bid using the Internet bundle option. When those multi-year contracts are included on a Funding Year 9 (2006-2007) Form 471, they will be denied that year and each year thereafter of their contract because they will not have listed telecommunications service and Internet access in two separate funding categories. These applicants will be unfairly penalized because the rules were changed in the middle of their contracts.

We also recognize that non-telecommunications providers are not allowed to provide telecommunications services under the guise of a bundled Internet access service. This concern, however, is not addressed by requiring unbundling and needs to be addressed through other means. The ESL is not the vehicle to address this problem.

As you can see, there are numerous operational considerations and consequences that would arise from such a policy change, and these concerns have not been fully considered and addressed. Make no mistake, the removal of the Internet bundle will lead to rampant denials of applications containing Internet access. We do not believe this is the intent of the Commission, but this will be the result.

Wireless Internet and E-mail Access Restrictions

The Commission's restrictions on remote Internet access from ineligible locations historically has prohibited Internet access (funded through E-rate) from an ineligible location (such as a home or non-school or non-library location). This is because the statute, Section 254, permits E-rate discounts only to schools and libraries and not to other locations such as homes.

There has been a rapid emergence of wireless devices that provide a multitude of applications such as cellular phone service, paging, Internet access, and e-mail. In some cases, these services are truly ancillary to the primary function of the cell phone, and in other cases, such as Blackberry's or Trio's, the devices are used predominantly for all four services. There has never been any guidance given to the applicant community regarding the eligibility of these services.

The language contained in the draft Eligible Services List seems to indicate that unless all Internet access and e-mail services are used on school property, they are not eligible unless an auditable record is available to determine what exact services are used each month at each location.

We urge the Commission to rethink this decision. In its Second Report and Order (FCC 03-101, released April 30, 2003), the Commission amended its rules to clarify the meaning of educational purposes as follows:

[A]ctivities that are integral, immediate, and proximate to the education of students, or in the case of libraries, integral, immediate, and proximate to the provision of library services to library patrons, qualify as "educational purposes." Activities that occur on library or school property are presumed to be integral, immediate, and proximate to the education of students or the provision of library services to library patrons. 47 C.F.R. § 54.500(b).

And the subsequent guidance provided by the SLD to applicants stated:

Eligibility of Priority 1 Services Off-site

In certain limited circumstances, telecommunications services used offsite may also be eligible. Examples of these eligible uses include "a school bus driver's use of wireless telecommunications services while delivering children to and from school, a library staff person's use of wireless telecommunications service on a library's mobile library unit van, and the use by teachers or other school staff of wireless telecommunications service while accompanying students on a field trip or sporting event." (Second Report and Order, footnote 28).

We believe the Commission's intent in the Second Order was correct. If a service is being used by a school employee and it is being used for an "educational purpose", even if the service is being used off-site, it is still considered eligible. With this Order, the Commission essentially removed virtually all references to ineligible locations, and in fact, the Eligible/Ineligible Locations document in the Reference area of the SLD website was rightly removed.

Although the footnote in the Second Order used the example of a telecommunications service, we believe that this was done before the enormous influx of transportable wireless devices, and in the current day and age, the Second Order should apply to all priority 1 services. For example, most employees are provided with Blackberry or Trio devices in order for them to stay connected to school business when they are at remote locations. Returning e-mail or receiving calls only when you are actually in your office

is no longer a reality, it is a luxury. In actuality, administrators are at remote locations – and often ineligible locations -- attending meetings for a vast majority of their day, during which time they cannot be “disconnected” from the school’s business. There is absolutely no difference between a school employee’s use of a cell phone beyond school premises and the use of a Blackberry device to access the Internet beyond school premises.

The Commission was absolutely correct when it determined that activities that are integral, immediate, and proximate to the education of students, are all considered “educational purposes” and therefore are eligible. We urge the Commission to remove this new restriction and instead use this occasion to clarify that the Second Order should be interpreted to include all priority 1 services in the definition of limited eligibility of services used off-site.

Should the Commission decide to retain the current language in the ESL, we request additional and immediate clarification of what is meant by “auditable system” to be used to track eligible and ineligible uses. Not knowing of any such system available, we wonder if this language is truly meant to deem ineligible such services altogether.

Further, should the Commission decide to retain the current language, we ask for clarification that these new restrictions are meant to be applied to the 2006-2007 funding year and not be applied retroactively to previously approved or pending applications.

Web Hosting Service

With the start of Funding Year 2004 (Year 7), the Eligible Services List was amended to include web hosting as an eligible service. Since this determination was made in late 2003, we have witnessed several companies, many of which are not Internet Service Providers, convince school that their services are E-rate eligible as web hosting. In some cases, these companies provide and host the District's website, and a full set of tools for district employees to create, edit and maintain that website -- including applications that reside on that website – in addition to the basic web hosting service.

Also, as technology and educational content evolve, more and more content is being delivered via the District’s website or other provider’s website, instead of the traditional textbook. Teachers routinely place all of the educational content for their lessons on a website in order to deliver the classroom instruction. This is a practice that is even more routine in schools that have a student laptop initiative or one-to-one student/computer ratio. The hosting of all of this content residing on a service provider’s server and delivered via the web is now being considered eligible by providers and applicants and as confirmed by funding approvals at the SLD. We do not believe this is what the FCC envisioned when they determined that web hosting should be eligible and we therefore ask the Commission to clarify what is considered eligible as web hosting.

In conclusion, SECA appreciates the FCC's efforts to try to simplify the E-rate program for applicants and service providers alike, and we look forward to submitting our comprehensive comments in the pending Universal Service reform proceeding. Unfortunately, the proposals contained in the draft ESL will further complicate the program and make it much harder for stakeholders to comply with the rules—and move in the opposite direction, away from simplification. We encourage the FCC to revise the ESL, consistent with SECA’s comments.

Respectfully submitted,

Gary Rawson, Chair
State E-rate Coordinators’ Alliance