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

In the Matter of	:	
	:	
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

INITIAL COMMENTS OF THE STATE E-RATE COORDINATORS ALLIANCE IN RESPONSE TO THE NOTICE OF PROPOSED RULEMAKING AND FURTHER NOTICE OF PROPOSED RULEMAKING

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I. INTRODUCTION

The State E-rate Coordinators Alliance ("SECA") is pleased to submit the following Initial Comments in response to the Federal Communications Commission ("FCC" or "Commission") Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking ("NPRM) in this proceeding.[1] SECA comprises members who fulfill statewide E-rate coordination activities on behalf of the 43 states and/or territories that these individuals serve. SECA operates without any staff, and accomplishes its work through the resources of its individual participants. Members of SECA typically have daily interactions with E-rate applicants to provide assistance concerning all aspects of the program. In addition, SECA members provide face-to face E-Rate training for applicants and service providers and serve as intermediaries between the applicant and service provider communities, the Administrator, and the FCC.

In 2004, SECA members together provided more than 1300 hours of E-rate training workshops to E-rate applicants and service providers. Further, numerous SECA members 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

[1] The NPRM was published in the Federal Register on July 20, 2005, at 70 Federal Register 41658-41677. Because the Federal Register publication is a summary, the paragraphs published in the Federal Register are different from the paragraphs contained in the Order released by the FCC. These Comments refer to the paragraph numbers as contained in the FCC's Order (FCC 05-124) released on June 14, 2005.

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

II. PROGRAM ADMINISTRATION

A. Introduction

SECA commends the FCC's initiation of this proceeding focusing on its improvement of the management and administration of the Universal Service Fund ("USF") and its oversight of the USF and the Universal Service Administrative Company ("USAC"), the Administrator of certain USF programs including the Schools and Libraries Universal Service Support Mechanism (commonly referred to as "E-rate").2 SECA particularly supports the Commission's goals of improving the E-rate program by simplifying the application process and expediting the disbursement process.3 At the same time, the FCC and other stakeholders surely know that any improvements and modifications must help to guard against waste, fraud and abuse of the E-rate program, in order to address concerns raised by Congress and other USF stakeholders such as the FCC's Office of Inspector General. The ultimate and long-term success of E-rate requires that the program be administered in a fair and sensible manner that enables participants to comply with appropriate safeguards and requirements which insure that the funds are used to provide access to advanced telecommunications services to schools and libraries across the country.

[2] NPRM, ¶ 1.
[3] NPRM, ¶ 1.

SECA fully understands that public confidence in the integrity of the E-rate program is vital to assure the continuity and success of the program.

Since its inception, the E-Rate program has successfully disbursed approximately $8.4 billion in order to provide eligible schools and libraries with connectivity to enhanced telecommunications services as well as library and classroom Internet access capabilities. Notwithstanding its administrative complexities and several prominent instances of misconduct in the use of funds, the majority of E-rate participants are honest and compliant, and have helped to meet the Congressional goal of making affordable advanced telecommunications services and high-speed Internet connectivity available to school-age children and library patrons across the country, pursuant to 47 U.S.C. §§254(b)(6), (h)(1)(B) and (h)(2)(A).

In establishing the E-rate program pursuant to Section 254, Congress explained the significance of this initiative to the quality of education and learning available to all Americans. The Conference Committee Report on the Telecommunications Act of 1996, which established the E-rate program, stated:

> The ability of K–12 classrooms, libraries and rural health care providers to obtain access to advanced telecommunications services is critical to ensuring that these services are available on a universal basis. The provisions of subsection (h) will help open new worlds of knowledge, learning and education to all Americans—rich and poor, rural and urban. They are intended, for example, to provide the ability to browse library collections, review the collections of museums, or find new information on the treatment of an illness, to Americans everywhere via schools and libraries. This universal access will assure that no one is barred from benefiting from the power of the Information Age.[4]

These statements are as true today – and even more so -- as they were nine years ago when they were first made. E-rate makes online resources available to school students, teachers

[4] Joint Explanatory Statement of the Committee of the Conference (H.R. Rep. No. 458, 104th Cong., 2d Sess.) at 133.

and administrators which *inter alia* enable students to learn through distance learning courses, to access information and content to augment their education, to take achievement tests required by No Child Left Behind online, to submit online reports to the United States Department of Education, to enable access to curriculum content and to undertake online instruction to meet the requirements of No Child Left Behind. Technology training is critical in order to prepare students for the workforce.

Streamlining of the E-rate application process will go far in allowing the Commission to achieve the twin goals of simplification and establishment of sufficient measures to prevent waste, fraud and abuse. Program simplification will enable the FCC to set forth clear requirements which are commonly understood and defined among applicants, service providers and the Administrator. In response to each publicized instance of waste, fraud or abuse of E-rate resources, lessons were learned and procedures were revised and revamped to close loopholes and to prevent reoccurrences of future problems. Any revisions to the program necessarily must be mindful of and incorporate the lessons learned regarding inappropriate use of program resources.

B. USAC Should Continue to Serve as the USF Permanent Administrator.

As the neutral, third party administrator of the Universal Service Fund, USAC has performed its duties in a professional manner consistent with the FCC's governing regulations. Although E-rate applicants are frustrated over the complexity of the program requirements and the delays in issuing funding commitment decisions letters ("FCDLs"), most of these frustrations are not directed at USAC per se but rather at the overall E-rate process. Although there is room for improvement in the manner in which USAC administers the program, it would be ill advised

to change the Administrator of the USF programs, or to establish a competitive bidding selection of the Administrator. A program of this size and complexity requires stable management and oversight. Subjecting program administration to periodic competitive bids would lend a dangerous instability factor to program processes and operations. The current Administrator's experience and expertise acquired over the last eight years provides substantial value and knowledge that would be lost if the FCC decided to change administrators or change the manner in which the administrator is selected for the USF programs.

That is not to say, however, that the current administrative structure should remain unchanged. As explained in more detail in the next section, the FCC must make modifications to the manner in which the E-rate program is administered, so as to respond to the concerns of the Government Accountability Office ("GAO") and to the program beneficiaries.

C. The FCC Must Dedicate More Resources and Establish a Streamlined Process for Making Prompt Policy Decisions and Providing Timely Policy Advice to the USF Administrator.

The current situation concerning the FCC's governance of the USF and the USF Administrator has become so bureaucratic and administratively cumbersome that the lack of timely policy guidance and decisions has become a major problem that routinely prevents applicants from timely receiving funding decisions and the disbursement of support. SECA and other E-rate stakeholders are keenly aware of the criticisms that the GAO and Congress have directed to the FCC for failing to provide sufficient oversight of USAC, On the other hand, program beneficiaries decry the layers and levels of complexity that they must navigate in order to clearly understand the program rules. This tension has arisen because the FCC necessarily retains day-to-day responsibility to make all policy decisions concerning E-rate and the other USF mechanisms, yet the FCC has not implemented a streamlined approach for the E-rate

Administrator or stakeholders to obtain timely policy decisions from the FCC. Although several years ago, the FCC delegated authority to the former Common Carrier Bureau to resolve appeals that did not involve novel questions of fact, law or policy, this delegation has not helped to streamline the process.[5] Comparable authority to resolve day-to-day routine policy issues was delegated to the Common Carrier Bureau staff, but again, this process does not appear to be working in practice. It is not at all uncommon for policy issues to take months for the FCC to address.

Often, when the FCC issues a decision, USAC will have a series of follow up questions that need to be answered in order to translate the FCC's policy advice into operational practice. If USAC identifies a policy issue which requires FCC clarification, there is no deadline or time frame within which the FCC must respond. Frequently, these policy decisions may be directly tied to the Administrator's review of funding applications; consequently, the lack of timely answers from the FCC further delays the time frame for issuing funding decisions to applicants. In other instances, applicants may file appeal of Administrator adverse decisions, which languish for years without resolution. Meanwhile, these applicants are precluded from receiving funding upon obtaining a successful resolution of their appeals.

Certainly the FCC, and specifically the Telecommunications Access Policy Division ("TAPD"), have many other responsibilities in addition to E-rate, and therefore, E-rate issues have to be balanced with other competing priorities and demands on the FCC's resources. But in the current environment where any infraction of a program requirement is equated to an instance

[5] *See* FCC 97-380; Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, CC Docket Nos. 97-21, 96-45, Third Report and Order in CC Docket No. 97-21, Fourth Report on Reconsideration in CC Docket No. 97-21 and Eighth Order on Reconsideration in CC Docket No. 96-45, FCC 98-306 (Released November 28, 1998) at ¶68; 47 C.F.R. § 54.722(a).

of waste, fraud or abuse, the clarifications that USAC and applicants desperately seek from the FCC are vitally important for assuring that the program is administered with sufficient and appropriate oversight by the FCC. The delays that applicants experience in having questions answered or appeals decided are creating a gridlock that poses a threat equal to the problem of waste, fraud and abuse as it is affecting the vitality and effectiveness of this program. Clearly improvements and modifications are needed to E-rate administration.

To accomplish this task, SECA proposes three interrelated solutions. First, using the existing parameters of its legal authority and power, the FCC should make the rules for E-rate more straightforward and clear, and eliminate the policy ambiguities that have plagued the program. As the application process is more understandable to applicants, it also will enable USAC to more readily establish operational procedures to implement the FCC's rules. The FCC, therefore, should make clear that USAC is empowered to implement the Commission's rules. Implementation of rules certainly is not the same as interpretation of those rules, and should provide assurance to Congress and the GAO that the FCC retains authority and oversight of USAC's operations.

Second, the Commission must devote more staff resources to overseeing USF administration. The FCC must staff the agency to administer the program efficiently and effectively, and not permit the program to languish because of its failure to make prompt decisions. A streamlined procedure must be put in place to enable USAC and E-rate stakeholders to seek rule clarifications from the FCC. Management and oversight of the E-rate program would be vastly improved by the FCC's review and resolution of USAC/SLD policy decisions and approval of USAC operations in a timely and responsible manner. For example, it would be reasonable to expect the FCC to provide direction and policy determinations on

specific USAC/SLD administrative issues within 30 days of USAC bringing the matter before the Commission.

Third, SECA proposes the creation of a formal advisory committee to provide policy and administration advice to the FCC and USAC. An advisory committee offers the opportunity for the FCC to lawfully establish a dedicated group of qualified individuals who are representatives of all of the various stakeholders who can provide vital input into the program and support the efficient ongoing administration of E-rate. The committee can serve as a forum for stakeholders to raise questions and concerns, and to develop policy and administrative recommendations upon which the FCC and USAC should act. The FCC can be confident that any consensus recommendation of the committee has taken into account all competing views on a particular issue since the committee will be composed of representatives of diverse interest groups with specific expertise and knowledge that is vital to assure the success of the E-rate program.

The committee could serve as a liaison with USAC, and assist in addressing operational issues to assure that USAC can promptly and efficiently implement the FCC's orders and regulations. At the same time, the committee also should be given the responsibility for recommending solutions and safeguards to preclude waste, fraud and abuse. It is the hope that this advisory committee would help prevent applicant level complexity that will lead to denial of critically needed E-rate funds and also would provide a much-needed vehicle for communication between the FCC and USAC. [6] [7]

[6] This recommendation is consistent with and builds on the model employed by the FCC to administer numbering resources. In 1995, prior to the passage of the Telecommunications Act of 1996, the FCC initially established an advisory committee, the North American Numbering Council (NANC) pursuant to the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 1, and directed the NANC to select a neutral, third party administrator of the NANP. In re Administration of the North American Numbering Plan, CC Docket No. 92-237, FCC 95-237,

D. USAC Should Be Subject to Periodic Performance Reviews.

The NPRM specifically sought comments on how to improve its oversight of USAC and to improve USAC's efficiencies in administering the USF mechanisms.[8] While USAC is required to prepare quarterly filings of financial and accounting data, including projected administrative expenses and projected program demand, these filing do not provide sufficient information concerning the efficiency with which USAC is administering the USF mechanisms. Such efficiency reports typically are presented to the USAC board at quarterly board meetings, but the public availability of this information is not altogether clear because, as a non-governmental entity, USAC is not subject to the Freedom of Information Act. The preparation and availability of these reports, moreover, is not prescribed by FCC regulation and therefore, are prescribed at the behest at the USAC board. While USAC also undergoes an annual financial

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Report and Order (Order released July 13, 1995). In the 1996 Telecommunications Act, 47 U.S.C. §151 *et seq.*, Congress provided an express legislative directive to the FCC in 47 U.S.C. §251(e)(1) to "create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis," which the Commission found was met by virtue of its July 5, 1995 Order.[6] [6]
The FCC convened the NANC specifically for the purposes of advising the FCC and to make recommendations, reached through consensus, that foster efficient and impartial NANP administration; to resolve initial disputes in accordance with the directions of the Commission; and to provide guidance to the NANP administrator – again, as directed by the FCC. See *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-03-3106A3.pdf*
Because NANC operates in accordance with the FACA, there is transparency of information that is available to all interested parties. See, e.g., http://www.fcc.gov/wcb/tapd/Nanc/nancsumm.html which sets forth a summary of the requirements applicable to advisory committees. The committee is convened pursuant to requirements set forth in federal statute—which carries with it the imprimatur of a process authorized by Congress.

[7] Convening an E-rate advisory committee is not altogether an original idea. When the FCC first established the E-rate program and the other USF programs after the 1996 Act, the FCC intended to appoint an advisory committee for the purpose of recommending a permanent USF administrator.[7] In its Report to Congress, however, the FCC explained that by appointing USAC as the permanent USF Administrator and directing that the former administrators of the Rural Health Care and Schools and Libraries universal service support mechanisms to be subsumed within USAC, it was no longer necessary to convene an advisory committee to recommend a permanent administrator. An advisory committee is needed now more so than ever, however, to streamline the FCC's oversight of the administration of USF.

[8] Id. at ¶¶ 9-16.

audit, these efficiency measures also are not the kind of information that would be included in audited financial statements. We believe these reports should, at a minimum, provide the following information in order to measure the Administrator's performance for the period of the report:

- Invoices: Number of invoices submitted, denied (and for what reasons), and processed. Also, average length of time to pay invoices.
- Certifications: Number of paper certifications received, number of certifications processed and RNL, RAL and 486 approval letters mailed. Also, average length of time to process certifications and mail associated receipt or approval letters.
- Form 471 applications: Number of applications processed, number of denials (and for what reasons), and number of applications by funding year remaining to be processed. Data should be stated according to number of priority 1 and priority 2 applications that are being processed after July 1 of that funding year.
- Appeal letters: Number of appeals submitted, number of appeals decided, and results of such denials.
- Service Substitutions and SPIN changes: Number of requests submitted and processed.
- Client Service Bureau: Number of inquiries via phone, e-mail and fax for given period, number of contacts that were monitored by supervisory staff to ensure quality assurance and results of such monitoring, and results of new periodic customer service follow-up by supervisors to ensure that applicant received quality, helpful, thorough information.

To its credit, USAC has required one of its major contractors, NECA Services Inc. ("NSI") to be subject to an annual performance agreement and to submit periodic performance reports to USAC throughout the year.[9] USAC should be subject to similar performance reporting requirements and this information should be made publicly available, and comments should be received regarding this report. Including public comment as part of a performance evaluation process is a logical premise of effective customer service and would provide regular and important program performance feedback to both USAC and the FCC and would result in enhanced effectiveness of program administration. The specific performance reporting

[9] SECA does not know whether performance reporting requirements are in place with USAC's other contractors.

requirements should be prescribed by the E-rate advisory committee that SECA recommends for the FCC to convene. Alternatively, USAC should submit a proposed performance reporting plan to the FCC which should be made available for public comment. In either event, the performance reports that USAC's contractors are obliged to submit should be subject to public scrutiny. While in the past such reports have been made available, it appears to be a gray area where USAC may now classify this information as confidential. The FCC should clarify that annual performance reports submitted by USAC's contractors shall be made available upon request.

E. The E-rate Program Requirements Should Be Centrally Organized and Maintained.

Over the past eight years, USAC and the FCC have gained a strong and valuable measure of experience in understanding and administering the E-rate Program, and continue to work toward implementing program processes as well as controlling waste, fraud and abuse. In an effort to control waste, fraud and abuse, however, the program has become mired down in regulatory requirements and procedures that give rise to an overly complex system of regulation. This immense set of program rules has made it very difficult for applicants to comply – not because they want to thwart these requirements but rather because there are so many requirements at this point in time that applicants may not know about all such requirements. In fact, SECA has fifteen individuals who have been State E-rate Coordinators since the program's inception and not one of them believes they know all of the E-rate rules. If these individuals – with their vast years of program knowledge and daily interaction with applicants, service providers and the SLD -- are not sure of all of the rules, it is virtually impossible for applicants to comply.

Each year, the application process has become more complex, and more requirements have been prescribed. Some such requirements have been imposed retroactively, which makes it exceedingly difficult for applicants to be in compliance. Other requirements have been established as part of the confidential Program Integrity procedures that the Administrator and USAC intentionally have withheld from public scrutiny because they have claimed that these procedures constitute internal program controls for evaluating the authenticity of applications. Yet, because of these restrictions, it is virtually impossible for applicants to be confident that when they submit their Form 471 applications for funding, they have complied with all program requirements. Then, when beneficiary audits are conducted by the FCC's Office of Inspector General, USAC's internal auditors or USAC's outside auditors under contract, and instances of noncompliance with program requirements are identified, each such instance is equated to a finding of waste, fraud and abuse – creating more momentum for criticizing the program and for imposing yet more regulatory requirements. The situation facing the E-rate program is a never ending vicious cycle of imposing more regulatory requirements; auditing and finding noncompliance; and then imposing more requirements.

There is no single repository for rules, policy and procedures related to the E-rate Program. Applicants and service providers must refer to multiple sources to obtain all the FCC rules, and Administrator policies and administrative procedures on a given topic. Applicants cannot simply consult the FCC regulations to obtain the guidance and clarity they may seek in order to submit their applications. In addition to the regulations, USAC's web site contains guidance on many different subjects that applicants are responsible for following. In the reference section alone of USAC's web site, there are at least 89 different documents and/or pages of information and requirements with which applicants are required to be familiar and are

expected to follow. This information goes into far more detail than the FCC governing regulations. The reference section is in addition to the multi-page form instructions for each of the forms that applicants must complete in order to apply for discounts and/or reimbursements. USAC also has been holding applicants accountable for policy guidance that can only be found in obscure E-rate training presentations that USAC posts to its web site each fall. The training presentations frequently contain new and updated program requirements that are not yet posted on the USAC web site under the reference section, and more importantly, are not contained in any FCC orders or regulations.

Applicants and service providers should be able to obtain all requirements associated with a particular aspect of the program by going to one location at the web site. This sounds extremely basic, but the task is daunting. Consider, for example, that with respect to one particular issue, competitive bidding, there are multiple locations that have to be accessed on the Web site in order to be certain to obtain all relevant requirements:

1. Form 470 Instructions
2. Form 471 Instructions
3. Form 470 Information for FY 2004 Applicants
4. Audit of Beneficiaries Fact Sheet
5. Beneficiary Audits – Auditors' Observations
6. Best Practices
7. Universal Service Administrative [Fund-should be Company], Schools and Libraries Documentation Checklist
8. Demonstrating Compliance with Program Rules
9. Form 470 Reminders
10. Form 471 Reminders
11. Free Services Advisory
12. Obligation to Pay Non-Discount Portion
13. Selecting Service Providers

14. Selective Review Information Request
15. USAC and SLD Do Not Evaluate, Approve or Endorse Service Providers
16. Whistleblower Hotline (Code 9 Calls)
17. 2005 Training Presentations – Program Compliance and ABCs of E-rate

With more than 17 documents which must be read and followed in order to follow the competitive bidding rules, it is impossible for applicants to be confident that they are "doing everything right."[10] While applicants appreciate the fact that USAC has published guidance and information to explain the program requirements, the proliferation of information and lack of organization of this information has rendered USAC's guidance ineffective. Applicants become confused, frustrated and disillusioned when they undertake what should be a welcome opportunity – not a Herculean task – of navigating the USAC–SLD web site. The Administrator must be required to improve the design of the web site so that it is possible to retrieve all pertinent information on a particular subject more readily than the present system. Centralizing and standardizing the way in which the program requirements are reported is a critical first step in the web site improvements that must be made.

There must be one repository where the applicant and service provider can reference ALL appropriate guidance. The rules must be clear, concise and up-to-date. If rules from another federal program also apply to the E-rate program, those rules must be spelled out in the E-rate guidance and not simply refer the applicants to another web site or guidance document. The repository must be posted to the Schools and Libraries web site under a section heading of Program Compliance. Every rule, policy or procedure must be listed in this section. The information must include the effective date (beginning and ending) of each item. The FCC rule, policy or procedure must remain in this section for the duration of any applicant or service

[10] This example further illustrates SECA's recommendation to modify the current E-rate competitive bidding rules.

provider audit period. Additions, changes and deletions to any rule, procedure or policy must be identified via the "What's New" section of the Schools and Libraries web site.

In addition, USAC must be directed to review all process and procedures, and to identify each information request or certification that its procedures currently require applicants or service providers to submit. When a form such as a budget, letter of agency or additional certifications are required of applicants or service providers, the FCC and USAC must obtain OMB approval for the information collection, and shall post the templates or forms on its Web site.[11]

III. PROGRAM MANAGEMENT

A. Introduction

The current regulatory construct for administering the E-rate program must be overhauled in order to make the program more manageable for applicants, service providers, the Administrator, the FCC and auditors. The program is so overly complex that the administrative costs have risen substantially over time, with no end in sight. By simplifying the application process, the requirements will be made clearer; concerns about waste, fraud and abuse can be addressed, the Administrator can more readily administer funding, and auditors will be able to more readily verify whether applicants and service provider are in compliance. Clearly, laying requirement upon requirement because of the overly broad classification of any infraction as waste, fraud and abuse has not been effective.

[11] In addition to the 14 certifications on Block 6 of Form 471 that each application must make, USAC requires various additional certifications to be made during the program integrity review process. *See, e.g.,* Certifications for Remote Access Equipment, Equipment that establish a Virtual Private Network, File Servers, Extensive File Storage, Wireless Components, Ineligible Functionality that must be Cost Allocated, Amortization of Up Front Service Provider Infrastructure Costs, On-Premise Priority 1 Equipment. Item 21 Attachments for Form 471 under the Reference Section of the USAC SLD Web Site.

B. The Basic Framework For Processing Priority 1 Funding Requests Must Be Changed to Become More Applicant-Friendly.

The E-rate program is founded upon the premise that all eligible schools and libraries will benefit from discounts on all telecommunications services and Internet access services, as well as Internal Connections services and equipment. In its Fifth Order on Reconsideration and Fourth Report and Order in CC Docket No. 96-45, FCC 98-210 (released June 22, 1998), the FCC established priority one services on the basis that "to the extent that we are unable at this time to fund demand fully, the best approach is to provide full support for recurring services, and to direct support for internal connections to the neediest schools and libraries." *Id.* at ¶38. Because telecommunications and Internet access services are recurring services, these services were deemed to be the highest priority and should be funded first for all applicants regardless of the applicant's E-rate discount.

In order to implement this basic premise, a shift must occur in the E-rate Administrator's approach for processing priority 1 funding requests. During review of funding applications (currently the FCC Form 471), the E-rate Administrator should communicate and interact with applicants in order to assist eligible E-rate applicants in successfully being funded for priority 1 eligible services.

Currently the E-rate Administrator engages in program integrity review of each priority 1 funding request and any request which does not meet the hyper-technical review procedures is denied. Every denial of priority 1 services for hyper-technical reasons of alleged noncompliance is then mistakenly classified by interested third parties as an instance of fraud, waste or abuse. This leap, however, is completely unjustified. In reality, these denials penalize well-intentioned applicants who are doing their best to comply with overly complex program requirements and get tripped up by committing inadvertent mistakes. Applicants who have participated in the site

visit program that Bearing Point is conducting at USAC's direction repeatedly express concern over the difficulty and challenge of understanding and complying with program requirements. *See, e.g.*, http://www.sl.universalservice.org/sitevisits/april05report.asp; http://www.sl.universalservice.org/sitevisits/july05report.asp.

The vast majority of applicants earnestly try to comply and any shortcomings or mistakes are not deliberate and definitely not situations involving intentional wrongdoing such as waste, fraud or abuse. More importantly, the notorious instances where criminal prosecution has occurred concerning E-rate wrongdoing have related to priority 2, internal connections procurements, and not priority 1 services. Although some may posit that such wrongdoing may be uncovered with further investigation, such supposition has not been borne out by the evidence. Indeed, in the one known situation where a priority 1 service provider was found to have committed a rule violation concerning priority 1 services, the service provider initiated proactive contact to the FCC upon identifying the problem, and entered into a consent decree resulting in enhanced E-rate training of employees.[12] In reality, many of the PIA procedures governing review of priority 1 FRNs are excessive and needlessly burdensome on applicants. The limited examples of waste, fraud and abuse that have so publicly damaged the reputation of this vital program have been found in priority 2 applications. Thus, the E-rate Administrator's resources would be much better served by streamlining the review of priority 1 funding requests.

The universal service Administrator should be required to interact and communicate with all applicants and approve funding for all priority 1 funding requests for eligible services except

[12] In re SBC Communications, Inc., File No. EB-04-1H-0342, DA 04-3893, *Order Approving Consent Decree* (released December 16, 2004).

for those requests involving obvious program waste, fraud or abuse. In addition, the application process and corresponding rules and guidelines must be changed to be straightforward, written in plain language and to be far less burdensome than the current system that has emerged as a result of multiple layers and rules that are imposed on an ad hoc, rather than, holistic approach. The following basic principles must be adopted in order to accomplish these important objectives.

1. *Principle 1: Competitive Bidding/Pre-Discount Cost Determination Reform*

(a) Eliminate the Form 470 posting requirement for Priority 1 services.

In recent years, the E-rate's rules concerning competitive bidding and procurement have grown increasingly more stringent when it comes to competitive bidding and procurement. We are seeing constant modifications or interpretations to the competitive bidding rules, all of which require more work on the part of the applicant, in an apparent effort to try to control abuse or fraud. The problem is that the competitive bidding process contained in the Form 470 does not work and therefore the Commission and the SLD have been trying to fix a problem by tightening the noose on a non-effective solution.

In order to foster competition and ensure that pre-discounted prices were as low as possible, the Commission established a requirement in its original Order that mandated applicants to competitively bid the services for which they were seeking discounts for at least 28 days on the Administrator's web site. The Form 470 concept was designed, in theory, to ensure that the pre-discount cost was as low as possible and to promote local phone competition.

While we applaud the Commission's *goals* for the Form 470 competitive bidding process, we believe that the posting of services has not produced the intended outcomes. Eight years' experience has proven that very few, if any, entities receive viable bids as a result of their

priority 1 Form 470 postings. In fact, most entities do not receive bids from their incumbent providers, let alone from competitors. What the 470 has produced is a mechanism by which any vendor - from computer salesmen to stadium bleacher vendors - can access the phone, fax and/or e-mail address of 36,000+ entities. These solicitations usually have absolutely nothing to do with the services requested on the 470 and the form's contact is left spending valuable time trying to get off email lists, fax lists or the phone.

Further, since 1997, telecommunications costs have declined dramatically, as services and bandwidth have increased. As a result of industry consolidation, many of the competitive local exchange companies ("CLECs") have been acquired or have become niche service providers. Prices among competitors have become more aligned as profit margins have been shaved and competitors have become more adept at effective marketing of their services. Despite best efforts, local competition among wireline providers has not become vibrant in many of the less populated areas of the country.

Yet at the same time that the Form 470 has not achieved its goals, it has become one of the most rampant areas for inadvertent E-rate denials. At the three most recent SLD training sessions, the SLD cited the primary reason for funding denials as applicants' inability to comply with the E-rate program's competitive bidding requirements, particularly the 28-day window. This is a sad, but true statement, and truly shines a spotlight on the fact that deserving schools and libraries are not provided their E-rate savings due to this defunct form and requirement. Such problems with the Form 470 and associated ministerial denials have caused applicants to view the Form 470 as merely a stumbling block and meaningless administrative burden to achieving discounted services rather than an opportunity for broader access to relevant services at competitive prices.

Further, as the FCC observed in their NPRM, "relatively few" instances of waste, fraud and abuse are associated with requests and commitments for priority one services. Yet the program has imposed additional certifications and requirements on all priority 1 applicants as a backlash to the priority 2 abuse.

The Form 470 and its associated deadlines, category selections, multi-year contract and contract extension requirements annually are the basis for a multitude of administrative denials by the Administrator. Such denials aren't happening to applicants that are trying to commit fraud against the program, but rather are based on inadvertent errors committed by deserving, eligible schools and libraries. By removing the cause or basis for these denials, deserving applicants would receive the discounts to which the Telecommunications Act of 1996 made available to them, and an enormous administrative hurdle would be eliminated, which would reduce significantly the number of appeals that are filed annually with the SLD and FCC.

The problems recently experienced with denials based on contract renewals, extensions and amendments -- and the associated convoluted, ever-changing rules with this program area -- would be ameliorated if the Form 470 requirement was eliminated for priority 1 services while applicants would still be subject to its state's procurement requirements. Further, confusion and constraints arising from contract signing and ending dates listed on a Block 5 also would be removed because such dates would not be collected on the Form 471 application.

(b) Cost-Effective Funding Analysis During PIA Review

SECA believes that the Commission should focus on the cost-effectiveness of the pre-discount costs during the 471 review process taking into account that prices may be significantly more costly in remote regions of the country. Only in situations where the Universal Service

Administrator has cause for concern over the price reasonableness of a service would the applicant have to demonstrate compliance with state procurement requirements. If no such requirements govern the procurement at issue, or the Applicant cannot demonstrate that the price of the service is reasonable (such as providing a tariff rate sheet or proof that the vendor's prices are commercially available to other similarly situated applicants), the Administrator would reduce the funding request (but not deny it in its entirety) to an amount consistent with the prices paid by other similarly located customers.

Therefore, the Commission should establish some standard of review to ensure that applications fulfill this standard. We believe the SLD already has an 'unofficial' database that has specific internal connections product information and prices from vendors in order to better assess the reasonableness of requests. Whether this database has market or manufacturers suggested retail prices or some other price target to assess reasonableness we do not know. However, we believe that such a database can assist the SLD in assessing the cost-effectiveness of applicants' requests for products and services. We believe the Commission should expand the use of such a database to accomplish its goals, not rely on the Form 470 to encourage and enforce cost-effective applicant requests.

(c) Adherence to State and Local Procurement Laws

SECA believes that state procurement and competitive bidding requirements should govern the selection of vendors and therefore the pre-discount price. In addition, applicants should be required to self-certify on their Form 471 applications that they have complied with all state and local procurement requirements and have taken measures to ensure that the pre-discount cost is reasonable. The fundamental principle of following state and local procurement

laws is directly related to competitive bidding. In the earliest years of the E-rate program, the Commission emphasized that applicable state and local procurement laws should govern the E-rate competitive bidding and purchasing process. SECA is concerned that in recent years, the Commission has not abided by this basic foundation of the E-rate program and has used the Form 470 process to override state and local procurement laws. Applicants too often find themselves wrestling with conflicting interests of state/local procurement laws and E-rate regulations. (Does the applicant violate state procurement laws to follow E-rate rules? or Does the applicant follow state procurement laws and risk losing E-rate funds?) We contend that the Commission's tightening of the Form 470 process has too often put applicants in an untenable situation with regard to competitive bidding. We urge the Commission to return to its initial position that applicable state and local procurement laws govern E-rate applicants.

Accordingly, applicants should be required to self-certify on Form 471 that they have complied with applicable procurement laws. There is precedent for this practice on the Form 471 with the Item 25 self-certification. Following the example of the already established practice with Item 25, PIA reviewers could request evidence of compliance with competitive bidding as part of a selective review.

(d) Applicants should have the choice to base their Form 471 pre-discount requests on a signed contract or a current bill or a service provide quote.

The current requirement is that applicants can base their requests for a one-year tariff or month-to-month service on a current bill, but that for all other services – including multi-year tariff services – a contract, signed and dated by both parties prior to the applicant submitting the Form 471, must be executed. The contract requirement was established in order to set and

define the pre-discount amount for a specific set of services and while we understand the intention, the enforcement of this requirement has grown wildly out of control.

The contract requirement is almost entirely inconsistent with procurement practices, telecommunications regulatory practices, state contract laws, in some cases the Sarbanes-Oxley Act, and, in many cases, the real-world procurement schedule for many priority 1 services. For example, multi-year tariffs typically are not executed under a signed contract, yet they are now required to be under E-rate rules. Purchase orders – signed and dated by the school only -- are a common method of establishing a relationship between a school and vendor, yet E-rate rules now require that school purchase orders be countersigned and dated by both the school and service provider before being considered a valid agreement. This requirement, however, completely ignores the fact that a purchase order that is signed by a school is a legally binding agreement in most states. Several large service providers are refusing to execute contracts in January and February (prior to the close of the 471 window) that have actual service start dates of July 1 because it is seen as inconsistent with the new rules contained within the Sarbanes-Oxley Act. Cellular and paging services typically require contracts, but those contracts may be updated in mid-funding year when new cellular lines are added, cellular companies merge, or various rate plans are eliminated, thus putting the school in an impossible position in terms of managing their telecommunications contracts with the E-rate rules and schedule. In addition, many other priority 1 vendors provide special rate pricing in mid-funding year for a variety of reasons, which requires the signing of a new contract. Such new contract signing dates will then put the applicant in an untenable position of getting a better rate or having their E-rate funding jeopardized. And finally, because USAC requires each access circuit to be treated as a separate contract with a separate funding request, applicants are forced to separate multi-line access

accounts into multiple FRNs and allocate taxes and surcharges accordingly. This is an unnecessary complexity that adds to the work load of applicants, service providers, and USAC at both the application and invoices stages of the E-rate process.

2. Principle 2: Discount Reform

(a) Districts should receive a district-wide discount for shared services, regardless of which specific entities are identified on the 471 application as recipients of service.

While it is true that the program is designed to provide greater discounts to the applicants with the least ability to pay, the current rules that have been established to adjust a discount for each service depending on which buildings are receiving that service, are not based on real-world accounting and organizational structures. The tax base and poverty rate is the same for the entire district, regardless of which buildings in that district receive the service. Individual buildings within a school typically do not have taxing authority. Accordingly, SECA proposes that all priority 1 services should be considered shared services and subject to the shared service discount of **all** entities existing in the district at the time that the 471 application is prepared.[13] The current method of calculating the shared discount level for districts, in contrast to this proposal, requires that districts use a weighted average for each school building with student classrooms, and for buildings without students, the building uses the district's weighted average discount. The manner of computing districts' discounts has become unnecessarily convoluted and overly complex – which is addressed by adopting this streamlined proposal.

[13] While most internal connections equipment and service is computed using a site specific discounts, shared priority 2 services and equipment should be computed using the same proposal.

(b) The Shared Discount Simplification Proposal Streamlines the Manner in Which Districts Must Identify Recipients of Service.

Besides providing greater equity based on actual local taxing structures, this proposal would solve the problem of how to identify changes to a Form 471, Block 4 when schools have been opened or closed after the form 471 is filed. Because no such mechanism exists to inform the SLD that a new school has opened or is now receiving the discounted service, this has posed a problem to affected applicants because: 1) invoices are paid only for service provided to entities listed on Block 4 of the original Form 471, and 2) in audits and site visits, the applicant must be able to show that discounts were provided only to the entities listed on Block 4 associated with the FRN. Currently the Universal Service Administrator is concerned that when an entity is closed or opened, the omission or addition of the entity could result in a lower shared discount for the FRN. This concern would be ameliorated by assuming that the billed entity has a shared discount based on **all** schools in the district.

In addition, the simplification proposal resolves another complexity that has arisen as a result of the Commission's well-intentioned broadening of the definition of educational purposes. In the Second Report and Order in CC Docket No. 02-6, FCC 03-101 (Order Released April 30, 2003), the FCC clarified the definition of Educational Purpose 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."

This clarification enabled priority 1 services to be made available, in addition to school buildings with classrooms, other buildings within the District in which activities with an educational purpose were conducted.

In the course of implementing the FCC's educational purpose definition, the Universal Service Administrator created a new classification of entities called Non-Instructional Facilities ("NIFs") and required applicants to obtain an entity number for each such facility, and to list each such facility on the Form 471 application. Further, based on SECA members' experiences with navigating the PIA process, it appears that a new annual certification process also has been instituted for these NIFs whereby districts are required to respond to PIA reviewers with answers with respect to NIF listed on the Block 4 to the following questions:

1. Are any of these facilities stand-alone structures?
2. Are any of these facilities on the same campus as another district school?
3. Do either of these two descriptions accurately and completely describe your school or school district's situation? If so, which one or both?
    a) The non-instructional facilities are owned by the school or school district and are used solely for school or school district business.
    b) Only school or school district employees use these non-instructional facilities.

The process for assigning entity numbers and providing discounts on services for NIFs has become as convoluted as the rest of the E-rate program. If the NIF is located on the same campus as a school building with classrooms, the NIF does not require a separate entity number IF the NIF only provides services to the adjacent school building. If, however, the NIF provides services to other school buildings located on a different campus in addition to providing services to the school building to which it is adjacently located, the NIF does require a separate entity number.[14] This is just one example of how an applicant can become inadvertently entangled with the E-rate program requirements and may unwittingly commit an infraction of the program requirements. If an applicant is tripped up and misunderstands the NIF entity number requirements – which certainly would be understandable given how complex the requirement is -

[14] http://www.sl.universalservice.org/reference/Entity_Numbers.asp.

- and fails to obtain an entity number for a school cafeteria that is located on the same campus as a high school but which also provides meals for other school buildings located on a different campus, the applicant would then fail to list the NIF on its block 4 of its Form 471 application.

When an auditor may conduct a beneficiary audit, the auditor could very well cite the applicant because the applicant should have obtained a NIF for the district cafeteria building and should have listed this building as one of the recipients of service on Block 4 of the Form 471. Such a program requirement violation could put the applicant at risk for having to repay funds to USAC, and just as damaging, could put the applicant at risk of being accused of engaging in waste, fraud or abuse of program dollars.

In addition, PIA has asked State E-rate Coordinators to certify that the NIFs listed on district applications are considered "schools" (which they are not and to which all State Coordinators have not certified). And depending on the name of the NIF listed on the application, PIA reviewers have asked applicants to explain what educational purpose is served by various buildings such as bus barns and electrical facilities – even though the educational purpose is evident on its face.

The layers of complexity concerning NIFs have gotten thicker during FY 2005, when the E-rate Administrator instituted yet an additional burden on districts with NIFs that receive E-rate services. Under their new procedures, if a NIF building contains one single classroom – even a classroom that is only used for a few days per year or is used to conduct training to different students every day or every week – the district is required to provide a building discount for that NIF, based on that single classroom, using a 'snapshot' of students on a single day.

State E-rate Coordinators have repeatedly pointed out to the Administrator that the NIF is not a school, and that requiring districts to compute a specific discount for the building will not

result in a an accurate discount level for the building and likely will result in a disproportionately high discount being assigned to the NIF rather than using the district wide percentage – which is the discount level assigned to NIFs without classrooms. For example, there is nothing to prevent districts from using as its snapshot a day when the profile of students receiving instruction in the building is the poorest group of students. This procedure actually provides an incentive for districts to game the system, so to speak, and to assign the highest discount to the NIF. Amazingly, even after this flaw was pointed out to the E-rate Administrator on numerous occasions, the procedure has continuously been upheld.

Clearly, the flexibility that the Commission was attempting to provide in the Second Order has been eradicated with the imposition of more, rather than less administrative burden on applicants. Fortunately, this flexibility can be restored with the adoption of the shared discount simplification proposal. Because districts would no longer be required to separately identify each NIF, the additional NIF certifications that have been imposed on applicants would no longer be necessary. Instead, applicants would be required to certify that shared services will be provided only to eligible schools and eligible non-instructional facilities as part of the Block 6 Certifications on FCC Form 471.

Currently, a district calculates their discount as follows:

> Step 1. Calculate the discount for each school by dividing the total number of students eligible for the national school lunch program by the total number of students in that individual school. The answer will equal the percent of students eligible for school lunch.
>
> Step 2. Determine whether the school is classified as urban or rural.
>
> Step 3. Taking the information from steps 1 and 2, use the discount matrix to identify the discount for an individual school building. For example, an urban school with 45% of its students eligible for school lunch would have a 60% discount rate. If that school had been rural, the discount rate would be 70%.

Step 4. Multiply the discount rate from the discount matrix for each school by the total number of students in each school.

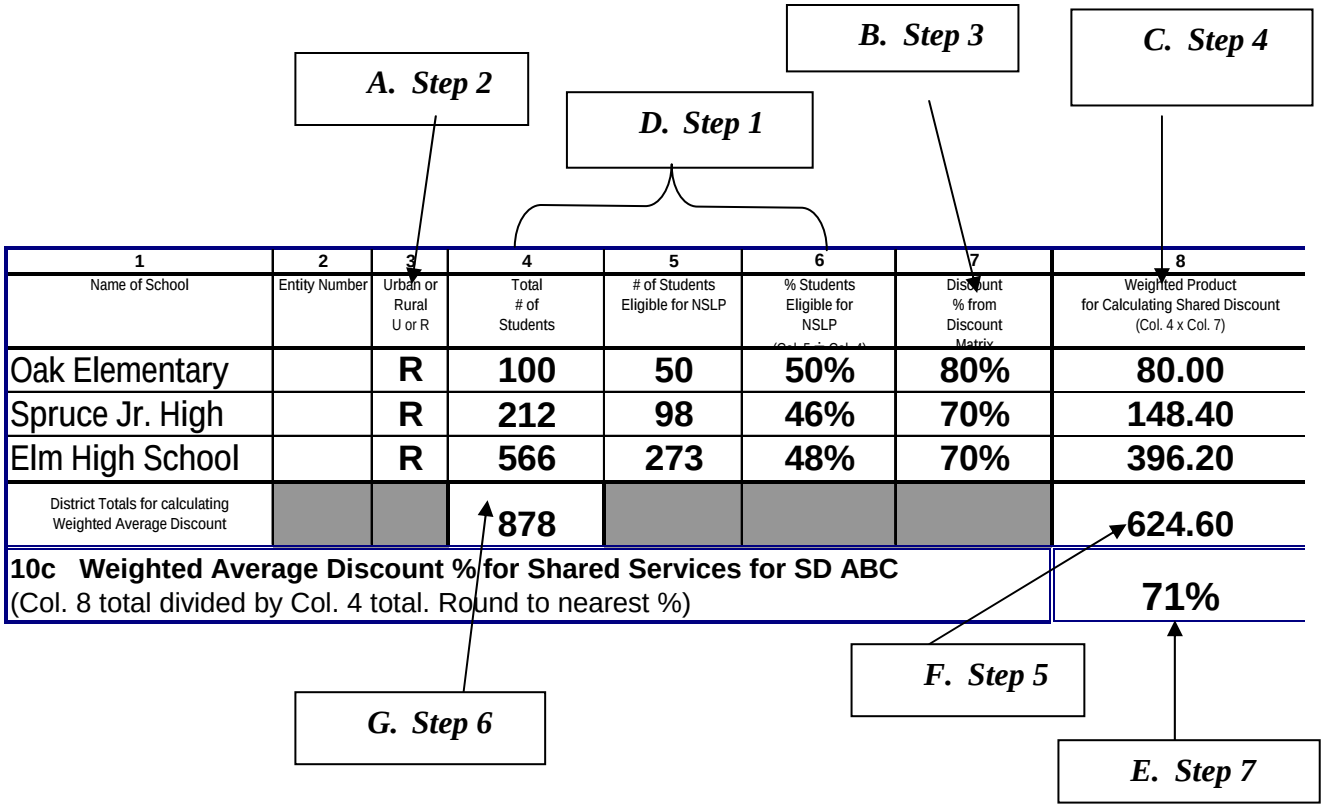
Step 5. Sum all of the totals in step 4.

Step 6. Add total number of students in each district.

Step 7. Divide the total from step 5 by the number of students in the school district.

The result is the discount rate for shared services for the school district.

Example – Current Calculations for Shared Services for 3 Schools in ABC School District:
(Note: If only two of these schools receive another service, the District is required to recalculate the shared services discount rate for just those schools that are receiving the service.)



1 Name of School	2 Entity Number	3 Urban or Rural U or R	4 Total # of Students	5 # of Students Eligible for NSLP	6 % Students Eligible for NSLP	7 Discount % from Discount Matrix	8 Weighted Product for Calculating Shared Discount (Col. 4 x Col. 7)
Oak Elementary		R	100	50	50%	80%	80.00
Spruce Jr. High		R	212	98	46%	70%	148.40
Elm High School		R	566	273	48%	70%	396.20
District Totals for calculating Weighted Average Discount			878				624.60
10c Weighted Average Discount % for Shared Services for SD ABC (Col. 8 total divided by Col. 4 total. Round to nearest %)							71%

Under the proposed simplified discount calculation, a district would only ever complete 2 steps to calculate the district discount rate for shared services. The discount would remain the same for all priority 1 services, regardless of the individual entities within the district that are

receiving the service at the time the Form 471 is filed. The district would calculate the total number of students eligible for NSLP in the district, divided by the total number of enrolled students in the district. Every district would receive a matrix discount for all shared services. The revised step-by-step discount calculation process would be as follows (using the same data from the previous example):

***Example*: Discount Calculation for ALL Shared Services for ABC School District:**

Step 1

Step 2

1 Name of School	2 Entity Number	3 Urban or Rural U or R	4 Total # of Students in District	5 # of Students Eligible for NSLP in District	6 % Students Eligible for NSLP Col. 5/Col. 4	7 Discount % from Discount Matrix
ABC School District		**R**	**878**	**21**	**48%**	**70%**

The proposed discount calculation for shared services is dramatically simpler than the current methodology. Applicants' ease of calculation, however, is only one benefit.

A second, equally important benefit is that PIA staff would not be required to verify every single school's enrollment and NSLP eligibility figures, but rather would simply look at the total enrollment for the district and the total NSLP eligibility. This simplification alone could save days or weeks when reviewing a single district's application.

Third, this modification will bring fairness and sensibility to the manner in which districts receive E-rate revenues as a single governing authority – a notion the Commission appears to

have acknowledged when they required only districts to obtain FCC Registration Numbers ("FCCRNs") as opposed to every single entity included on a Block 4.

Fourth, it would eliminate the bizarre and broken policy of requiring districts to take snapshots on a random day of students attending a classroom within the NIF. Those students would be counted correctly in the total enrollment and total NSLP data that would be required under this shared discount simplification proposal.[15]

The Commission should not be concerned that adoption of the shared discount simplification proposal will somehow work to the disadvantage of the poorest schools. Applicants will continue to be required to certify on FCC Form 471 that acknowledge that the discount level used for shared services is conditional, for future years, upon ensuring that the most disadvantaged schools and libraries that are treated as sharing in the service, receive an appropriate share of benefits from those services. Districts and their governing structure are accountable to the voters, their boards of directors, their constituents and their customers. These stakeholders provide the best mechanism to monitor districts' compliance with this requirement, and to ensure that students in the poorest schools receive the same level (or an appropriate share of the benefits) of services as students in other schools.

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[15] Although SECA strongly advocates reforming the discount matrix for priority 2 services, as is discussed later in these comments, we also would suggest to the Commission that perhaps it is time to consider changes to the discount matrix for priority 1 services as well. Such a change may be accomplished by removing the distinction between urban and rural, and instead using the rural discounts as the standard discount column. For years states have expressed concerns that the definition used to classify schools and libraries as rural or urban does not adequately represent whether a school is located in a rural area. In addition, adoption of this shared discount simplification proposal would mean that districts would receive a matrix-discount instead of a weighted average discount. By collapsing the urban and discount differential, discounts would not be risk for receiving a significantly lower discount than under the weighted discount calculation method. In addition, the FCC should consider adjusting the discount matrix to establish 5% discount intervals between the discount bands. This change would have the effect of moderating applicant changes in discount brackets.

The same discount calculation methodology was implemented in 2003 for libraries consistent with the original intent of the FCC's rules.

(c) Consortia Applicants Would Not Change the Way In Which the Consortia Discount is Computed.

Because consortia may or may not be contiguous with a local or state governance structure, they would have no way of knowing the identity of all entities which could possibly be within their jurisdiction, thus making it difficult to use the shared discount simplification proposal for districts. Nevertheless, consortia will still greatly benefit from this revised formula. Under the current discount calculation methodology for consortia, they are required to first calculate the weighted average discount for each district within their consortium, and then compute an average of those weighted averages. Under the proposed reform methodology, they would simply be required to provide the simple average of the discounts for all of their members. The difference between the consortium formula and the district formula is that the district is required to use the figures based on the assumption that ALL schools within the district are receiving the service. The consortium formula is based on the figures of the actual members of the consortium.

The consortium application should list the districts, and library systems but not the individual entities such as single school buildings.

3. Principle 3: E-rate Application Processing Reform

(a) If a Form 471 is submitted within the filing window and meets the minimum processing standards, it is presumed that PIA will work with the applicant to approve the application, permitting changes to all contracts, forms and paperwork, whenever possible, to comply with program rules and procedures.

The E-rate program can no longer be a program of "gotchas" and endless paperwork, rules, regulations, guidelines and deadlines. Such a system, we believe, was never what

Congress intended when they included Section 254 in the Telecommunications Act of 1996, nor is it what the Federal-Joint Board or the Commission envisioned when they developed the initial program parameters in 1997. Applicants must have the reassurance in knowing that they will receive their discounts from year to year and that if a mistake is made, the Administrator will work with the applicant to ensure the application is funded. Relying on E-rate funding for budgetary purposes is risky business because a denial could pop-up at any time for a very minor procedural mistake. When the basic principle of "No E-rate Applicant Left Behind" is adopted, appeals would become almost nonexistent at the Administrator and Commission levels.

(b) The Administrator and the Commission should make every attempt to issue all funding commitments by June 1 in order to have discounted bills begin by July 1.

The delay with which E-rate funding commitments are being made is astounding. In early program years, the goal was to have most, if not all E-rate funding commitments made prior to start of services, but this appears not to be a goal any longer. In FY 2004, only $375 million out of the $2.25 billion funding cap was committed prior to the July 1 funding year start date. In Year 8 of the program, only $265 million was committed to applicants before the funding year began – and these approvals were mailed June 27 – only three days before the funding year began. With more than a quarter of the funding year already passed, more than 1/3 of E-rate applicants nationwide have received no word from the Administrator regarding their E-rate funding. <u>If the E-rate program is to be reformed, one of the central and unwavering goals of the Administrator must be to issue all funding commitments at least 30 days prior to the start of the funding year in order for applicants to obtain discounted bills in July.</u>

When an E-rate funding commitment is made after the funding year begins, there are several consequences for both the applicant and the service provider. The applicant may or may

not be able to afford to pay 100% of the service during the months that the FCDL is delayed. If they cannot pay, the service is not installed or is terminated due to lack of E-rate funding, or resources are taking from other vital curriculum or education program areas in order to make up for the shortfall in funding.

Occasionally, a provider will roll-the-dice and bet that the applicant will eventually be funded and will continue with the service at the discounted rate – but this practice is extremely rare for understandable reasons. But it's entirely unheard of for a service provider to actually begin installation work for an E-rate-contingent service before funding has been committed. When this happens, the applicant is stuck with their prior inadequate level of service – or lack of service altogether – until the Administrator finally reviews and approves the application. So this begs the question, "If a school is required to have a technology plan, and dutifully plans curriculum, educational services and distance learning around E-rate eligible services and funding, how can schools provide these quality education services when the promised funding is received half-way through the school year? The impact of E-rate funding delays on education delivery is considerable, is increasing each year, and is and must be wholly avoidable.

Besides the impact on education delivery, many of the problems currently encountered during the E-rate funding year would be reduced significantly if funding commitments were made by June 1. Technology changes significantly in the six months after an E-rate application is submitted until the funding year begins, let alone 12-18 months. Models change, systems improve, components are retired, and vendors merge or go bankrupt. By issuing funding commitments before the funding year begins, many of these problems are decreased.

Further, schools typically install new technologies during the summer months in order to provide the least disruption to students, teachers and education delivery as possible. Installation

during the summer months also is desirable so that applications, networks and increased bandwidth can be installed and used by teachers and students in the classroom when the school year resumes in the fall. An unintended effect of late funding commitments is that the summer months are wasted and cannot be used to install equipment. Besides the obvious disruption to the education delivery in the fall, many schools are then forced to include additional E-rate requests for funding for priority 2 installation charges because staff is not as readily available during the school year to install components and upgrade networks, and work cannot be performed during the school day and therefore must be installed in a condensed format by many more technicians after school hours. The result is greater demand on the E-rate fund, all because funding commitments are so delayed.

Meeting this goal of issuing all funding commitment decisions by June 1 would require the following steps to be taken by several parties:

- ⇨ PIA review procedures would need to be approved before the close of the Form 471 application window in order for PIA to begin reviewing applications as they are submitted.
- ⇨ The Administrator would need to ensure that initial and final PIA reviewers are hired and trained before the close of the Form 471 application window, that the wording of the funding commitment letters has been approved in advance.
- ⇨ The USAC board and Commission would need to approve the release of E-rate funding commitments as soon as applications have been approved.

We are aware that meeting such a goal may require greater resources to be devoted by the Administrator during the review process and consistent with SECA's position on the record since the inception of the E-rate program, that greater administrative resources should be provided to the Administrator to achieve these goals. We fully understand and acknowledge that these funds will have to be deducted from the amount of E-rate funding available for funding E-rate applications. We believe that investing such funding into the administration of the program will

wholly make up for itself by providing greater efficiencies and reductions in other program functions. If the FCC implements the streamlined discount calculation process and the recommended option for applicants to use the same discount level for three years, the goal of June 1 funding notification is realistic.

4. Principle 4: Reimbursement/Discounted Bill Reform

(a) Form 472 (BEAR) Reimbursements should be remitted directly to the applicant and applicants should be given the option for Electronic Funds Transfer (EFT).

Since the inception of the program, SECA has advocated that BEAR Reimbursement payments should not be subject to the service provider pass-through requirement. The system is wrought with problems, including difficulties in obtaining BEAR service provider signatures, and having a form that is not available to be submitted and certified online (and the subsequent mathematical errors and administrative processing costs that result). But the single largest problem with the monkey-in-the-middle reimbursement methodology is that some service providers do not remit the reimbursements to the applicants in a timely manner. It is extremely difficult for applicants to enforce the FCC rules for vendor payments of BEAR amounts. Vendors may not realize that a payment remitted by USAC to the vendor is a BEAR reimbursement that the vendor should remit to the applicant. Similarly, there is little if any way for an applicant or the FCC to be certain that vendors remit payment to the applicant within 20 days of the vendor's receipt of payment from USAC. In many situations involving BEAR payments, applicants face the arduous task of shaking their money loose from the vendor.

Further, there have been numerous occasions where service providers have filed for bankruptcy between the times that services were provided and reimbursement forms submitted. In this case, the Administrator has established an arduous and complicated process called the

"Good Samaritan Process" where the applicant is required to find a telecommunications provider who is willing to act as the reimbursement pass-through agent instead of the bankrupt vendor.

As State E-rate Coordinators have repeatedly requested that service providers be taken out of the middle of the reimbursement process, we were repeatedly told that the current system was in place for two reasons: 1) Section 254 of the Telecommunications Act prohibited applicants from directly receiving USF funds, and 2) with funds going to the provider and not to the applicant, the Commission could only recover wrongly disbursed funds from the providers (which was supposed to be seen as a plus to the applicant community).

In terms of the latter argument, we note that the Commission has ordered the Administrator to collect improperly disbursed funds from the party responsible for program rule violation – whether applicant or service provider. Therefore, the rationale that the vendor-in-the-middle process somehow protects schools and libraries from returning funds no longer exists.

In terms of the first argument regarding the prohibitions in the Telecommunications Act of 1996, we have found no legal basis for this statement. The development of the BEAR form was undertaken by the Administrator, with oversight and approval of the FCC and Office of Management and Budget ("OMB"). The BEAR form was originally developed to address those situations that arose frequently and regularly during the first funding year, and fell into three general categories. First, because of the pre-existing contract rule, which exempted contracts that were executed on or before July 1, 1997 from the competitive bidding process, some applicants already had been obliged to pay for telecommunications, Internet access and internal connections. Those applicants fully paid for those services using their funds. Second, and similarly, other applicants received funding commitment decision letters well after the start of the first program year, and decided to commence the receipt of and concomitant payment for

services under contracts in anticipation of receiving a favorable decision letter. Third, the majority of service providers had not been able to establish the billing systems necessary to apply discounts on applicant bills during the first funding year, and therefore, relied on the BEAR form as a means of providing discounts to their E-Rate customers.

Importantly, few if any of these situations were contemplated by the FCC in issuing its *First Report and Order* where it initially directed that service providers would provide discounts to applicants and seek reimbursement from the fund. The only mention of service provider reimbursement to applicants for services paid in full related to advance payment for multi-year contracts.[16] The Commission clarified that only the current year's payments are eligible for discounts under E-Rate. Nonetheless, applicants may "use their own funds to pay full price for the portion of the contract exceeding one year (pro rata), and may request that the service provider seek universal service support for the pro rata annual share of the pre-payment. The eligible school or library also may request that the service provider rebate the payments from the support mechanism that it receives in subsequent years to the school or library, to the extent that the school or library secures approval of discounts in subsequent years from the Administrator."

In fact, the *First Report and Order* made clear that service providers could not *mandate* applicants to fully pay for services and then seek reimbursement from the Administrator.[17] The Commission made clear that the discount methodology was adopted as a means of easing the administrative burden of E-Rate applicants and *not* because of any underlying legal requirement:

> We conclude that requiring schools and libraries to pay in full could create serious cash flow problems for many schools and libraries and would disproportionately affect the most disadvantaged schools and libraries. For purposes of administrative ease, we conclude that service providers, rather than schools and

[16] First Report and Order at ¶544.
[17] Id. At ¶586.

> libraries, should seek compensation from the universal service administrator. … To require schools and libraries to seek direct reimbursement would also burden the administrator because of the large number of new entities that would be receiving funds.

Apparently, this language has been turned on its face and construed to prohibit E-Rate applicants from *voluntarily* electing to receive direct reimbursement through the BEAR form. Initially established as a means of assisting schools, the discount reimbursement mechanism has become extremely burdensome and denied outright reimbursements in those situations where the service provider has failed to comply with the BEAR form requirements.

While section 254(h)(1)(B) prescribes that service providers shall provide discounts to schools and libraries, and shall either receive reimbursement of those discounts from the universal service mechanism or treat the discounts as an offset to their contributions to universal service, the statute is silent as to how to address those situations where the applicant has already paid for the service in full. <u>There clearly is no statutory prohibition against allowing applicants to receive reimbursements directly from the universal service mechanism.</u>

Our above comments already explained the difficulties that applicants experience when they already paid in full for services on which discounts have been approved by the Administrator. Applicants have conveyed their frustrations to us time and again, and we repeatedly must explain to our constituents that the current program procedures preclude applicants from directly receiving the BEAR checks. The point here is that the current BEAR process further delays applicants' receipt of reimbursements of discounts, for no valid reason. If the program procedures were to be modified to permit applicants to directly receive BEAR reimbursement checks, the workload of the Administrator and FCC would be decreased because the Administrator and FCC would no longer be required to seek compliance and undertake

enforcement of the requirement for service providers to remit the BEAR payments to applicants. In addition, applicants would no longer struggle with their providers to pass on their entitled-to reimbursement funds and would not ever be in a position to have to use the "Good Samaritan Process" when their provider shuts its doors or files for bankruptcy prior to the completion of the reimbursement process.

(b) There should be penalties assessed against companies that refuse to provide applicants with the choice of receiving discounted bills, as required by the Commission 2nd Report and Order, April 2003.

There continue to be companies – even telecommunications carriers – that refuse to provide applicants with discounted bills. Without penalties and enforcement mechanisms established by the FCC, such practices will continue. Further, we have found a disturbing practice among both priority 1 and priority 2 service providers where providers will agree to provide discounted bills, but will only do so at a steep administrative fee. Obviously, this negates a significant amount of the applicants' E-rate discounts and has the effect of providing the applicant with no real choice as provided by the Commission.

Based on experience, SECA understands the most common reason why providers are implementing a surcharge for discounted bills. It is less the result of the administrative burden required to provide discounts to bills and more a result of the unbearable delays in getting invoices paid by USAC. These fees are, in effect, a late penalty charged to the customer for past-due invoices by USAC. USAC invoicing clearly needs to be expedited and reformed, and as such, the FCC should make clear that vendors are prohibited from charging an administrative fee for offering discounted bills to applicants.

Further, AT&T's formal request to allow the Company to use a modified reimbursement process as a replacement for discounted billing should be denied. If service providers are

permitted to use a substitution for discounted billing, none would ever take the steps necessary to finally provide discounted bills as the Commission intended in its original Order.

The Commission cited up-front cash layout as a major reason to permit applicants to choose discounted billing. But another important and equally compelling reason for providing applicants with discounted bills, that the Commission did not mention, is that the applicants will be relieved from completing yet another form to receive their discounts. Applicants already are required to submit at least three forms to the SLD in order to apply for E-rate discounts, with the BEAR form being the fourth. By permitting vendors to not discount bills, the Commission is in no way helping applicants with streamlining the application process. Therefore, we urge the Commission to expedite its issuance of an Order denying AT&T's petition, and impose penalties for companies that refuse to offer discounted billing, Without such a formal denial of the petition, AT&T and other providers will continue to refuse to provide discounted bills while this petition is pending.

5. *Principle 5: E-RATE Portal and Re-Engineering of Key E-rate Forms and Functions*

   (a) The 471 should become a dynamic online portal that is the basis for Item 21 attachments, service start date activations, service substitutions, SPIN changes, BEAR reimbursements and status reports. There would continue to be a 471 window for Priority 1 services, but the Form 471, its rules, and associated review process would be revised to automate these processes.

SECA envisions a virtually paperless E-rate application process where all current functions would be conducted online via the E-rate Portal. When the program was created more than eight years ago, online banking and account management were in their infancy. Since then, technology and software development has improved dramatically and most applicants are fully comfortable with managing online accounts for grants, student accounting, banking, retirement

and investment accounts and the list goes on. A paperless E-rate process can be created with a fraction of the funds that the Administrator spends annually processing paper applications and certifications and it can be a reality in the very near future.

(b) The E-rate Portal would be used to submit Form 471 application forms within the funding window as follows:

(i) Applicants would enter the portal using their entity number and select "Create new Form 471 Application." The system would then ask the applicant if they would like to copy a previous year's application. If the applicant selects 'yes', the system will display the 471s from the previous year and permit the applicant to make any changes to contact information, NSLP data or enrollment data, or Block 5 FRN information. If changes were made, a new online Item 21 attachment would be requested to determine the need for additional funds. The system would then ask if the applicant would like to add any additional funding requests to Block 5 for the next funding year.

(ii) The SPIN entered in Block 5 would be linked to the "Telecommunications Carrier" (also known as the "Eligible Telecom Provider" database, to confirm whether a SPIN is recognized by USAC to be a Telecommunications Carrier, that is, a carrier that is authorized to provide telecommunications services. If an applicant chose the telecommunications category of service, and selected a SPIN for a non-telecommunications carrier (that is, a company not recognized by USAC to be authorized to provide telecommunications services), an alert would appear to explain the problem. The applicant would be advised that a different SPIN and vendor must be selected in order to complete the FRN for telecommunications service.

(iii) The online Item 21 description of services tool would be very specific and dynamic, and would replace the submission of contracts and bills. When a

specific service was chosen on the online Item 21 description of services, the system would generate a pop-up window to alert the applicant to any partial or conditional eligibility rules; and the applicant would be required to certify that the service/equipment would be used in a manner that would be eligible for E-rate discounts; or that the prediscount price already had been cost allocated to remove any ineligible costs. Applicants would have the opportunity to revise the FRN prediscount amount to perform a cost allocation. This new functionality would altogether replace the additional certifications that are generated during PIA review. And since no individual entities will be listed on the Block 4 discount calculations, there would be no need for the non-instructional facilities (NIF) certification as are routinely asked under current program rules.

(iv) The Block 5, FRN page would include the BEAR/Discount Bills choice designation, which would then be memorialized on the FCDL which is sent to both the applicant and service provider.

(v) The questions set forth on the current Form 486 would be moved to asked as part of the Form 471, Block 5 at the individual FRN level. These would include:

- Has your technology plan been approved or will it be approved by start of services?
- Who approved your technology plan or who will have approved your technology plan as of start of services?
- Are you compliant with the Children's Internet Protection Act ("CIPA") or will you in compliance with CIPA by start of services?

If the answers are yes, an option would be offered to allow the applicant to automatically confirm that services will begin as of the service start date. If the answer to any of these questions is no, or if the applicant would like to wait and confirm the service start date at a later time, the applicant

would then "activate" the FRN using the Portal instead of actually submitting a Form 486. This would greatly reduce paperwork for the SLD and the applicant. Further, since the CIPA certification language was added to the Form 486, and thus a 120 day deadline was imposed for filing the Form 486, funding reductions for late or non-filing of this form – after an applicant's application was successfully funded – have been rampant. It is not an exaggeration to say that millions of dollars are forfeited annually due to inadvertently late or non-filed Form 486s. By moving the Form 486 certifications to the Form 471, Block 5 level, such reductions in funding would almost be eliminated.

(c) In addition to the ease of use of the new Form 471, the Portal is envisioned to be a one-stop-shop for all post-Form 471 window functions.

(i) Status Report Functions: After entering the applicant's entity number, they could view all of their submitted FRNs to view their status at any given time during the process. This status would include the status of the FRN itself, whether it has been "activated" (either by the Form 486 certifications on the Form 471, at the Block 5 FRN level, or by making the certifications using the Form 486-portal function), and whether any invoices have been submitted pertaining to that FRN (and if so, when the invoice was submitted and when it was authorized for payment).

(ii) Post-Commitment Change Functions: On the same screen as the various FRNs for that funding year would be several function buttons that would permit the applicant to conduct all service substitution notifications, SPIN change notifications, Split FRN notifications, and Form 500 changes without creating a new form, without wasting any paper, without mailing any documents to the SLD, and without re-typing the same basic contact information, 471 and FRN information into every form.

For example, the applicant would call-up the FRN and online Item 21 description of services, and click on a "Substitute Service" or "Correct

SPIN" or "Change Provider" or "Cancel or Reduce Funding" icon. From there the applicant would enter the new service information, or new provider information and electronically submit it to the SLD for approval. The SLD turnaround time for service substitutions and SPIN change approvals should be 10 days or less and after such approval was granted, an e-mail would be sent to the applicant notifying them that their request had been approved.

(iii) E-rate Reimbursement Process: The E-rate reimbursement process should be done entirely online within the E-rate Portal. Creating an online Form 472 under the current rules would be nearly impossible because both the applicant and the service provider must sign the form. If applicants are provided direct reimbursement from USAC, as we have outlined previously in this reform proposal, the service provider certifications are no longer relevant because the certifications merely state that the provider will remit the authorized reimbursement amount within 10 days of receipt of payment, and do so prior to using the payment from USAC. Those are the only two service provider certifications made on the Form 472 – certifications that can and should be made on the Form 473, Service Provider Annual Certification Form (SPAC). By providing direct applicant reimbursement and moving those certifications to a more appropriate form, the Form 472 BEAR Form would be an applicant-only form and the form could be completed entirely online using the Portal.

To obtain reimbursement, the applicant would not actually create and submit an online Form 472, but rather would display their FRNs from the previous year, and click on a box next to that FRN which states "Submit for Reimbursement." A screen would then appear – pre-populated with the entity information, contact information, FRN number, 471 number, approved discount and SPIN. The applicant would then simply enter the months of service being included in the BEAR and the pre-discount costs incurred. Because the system would be dynamic, the reimbursement

request would automatically be generated using the approved discount percentage and common mathematical errors would be eliminated, thus reducing the workload of the SLD's Problem Resolution team. This type of interface is common in today's world would be similar to online bill-payer features offered by most financial institutions.

By instituting this Portal concept and using this simplified E-rate application process, the following forms and letters would be eliminated.

- Form 470
- Form 470 Receipt Notification Letters
- Form 486 (except in the rare instances where an applicant wants to wait to "activate" their FRN)
- Form 486 Approval Letters
- Difficult Form 471, Block 4 calculations for districts (which will provide a simplified Block 4 for consortia)
- BEAR Approval Letters
- Quarterly Disbursement Reports
- Good Samaritan Process and Letters
- SPIN Change Letters
- Service Substitution Letters
- Form 500
- Form 500 Approval Letters

We can only begin to image the hundreds of millions of dollars in savings to USAC through virtual elimination of paper application processing costs, mailing costs, personnel costs—and in addition, the time savings that would be afforded to E-rate applicants and providers and a sense of restored faith in the program, upon implementation of these sensible recommendations.

C. Priority 2 Funding Reform: All Applicants Should Have An Opportunity to Periodically Obtain Internal Connections Funding.

1. Introduction

When the E-rate program was first announced by the FCC in its May 8, 1997 Report and Order, the Commission had no historical basis upon which to predict whether funding requests from eligible schools and libraries would be less than or greater than the $2.25 billion annual funding cap that was established. The program started out as a first come, first serve application program, and a set of priorities was devised which would take effect when annual funding requests reached $2 billion.[18]

Even before the first application cycle began, the FCC decided it would be more equitable to establish a filing window so that all applications filed within that period would have equal priority.[19] In addition, the FCC established the current rules of priority that distinguish between priority 1 and priority 2 services in order to reconcile its goal of providing support to the most economically disadvantaged applications within the framework of a filing window – rather than a first come, first serve approach.[20] Further, the FCC made this revision in recognition of the level of demand exceeding the available funding for the first program year – and its anticipation, which is telepathic in retrospect, that this situation may arise in later program years.[21]

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[18] In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 97-157, *Report and Order* (Order Released May 8, 1997) at ¶¶ 535-540.
[19] Public Notice, DA 97-1957, CC Docket No. 96-45 (Released September 10, 1997); In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Third Report and Order*, FCC 97-380 (Order Released October 14, 1997).
[20] In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Fifth Order on Reconsideration and Fourth Report and Order*, FCC 98-120 (Order Released June 22, 1998) at ¶¶ 34-38.
[21] *Id.* at ¶ 34.

In addressing the procedure for allocating and committing funds, the FCC has always been guided by the principles of equity and fairness as well as the desire to provide the greatest assurance of support to the schools and libraries with the greatest levels of economic disadvantage.[22] The concept of priority one services was founded on the principle of equity and fairness, that is, all applicants should be able to receive some level of support.[23] The concept of priority two services and giving priority for funding the applications with the highest discounts for priority two services was founded on the second principle of assuring that the neediest applicants received the greatest amount of support.[24]

In each application year, the demand projections have exceeded the amount of available money, and funding for internal connections has typically not been available for applicants with a discount of less than 70%. The following chart shows the history of E-rate funding demand and the discount level floor for funding of internal connections:

Year	Telecomm Services	Internet Access	Internal Connections	Total	Internal Connections Funding Threshold
1998	**$703.6**	**$114.3**	**$1,484.5**	**$2,302.4**	**70%**
1999	**$678.7**	**$166.6**	**$1,461.7**	**$2,307.0**	**20%**
2000	**$1,072.7**	**$363.3**	**$3,285.3**	**$4,721.3**	**82%**
2001	**$1,285.6**	**$447.0**	**$3,462.1**	**$5,194.7**	**86%**
2002	**$1,404.8**	**$411.9**	**$3,919.2**	**$5,735.9**	**81%**
2003	**$1,306.7**	**$438.5**	**$2,972.8**	**$4,718.0**	**70%**
2004	**$1,273.9**	**$326.7**	**$2,677.8**	**$4,278.4**	**81%**

[22] *Id.* at ¶ 35.
[23] *Id.* at ¶ 35.
[24] *Id.* at ¶ 38.

Schools and Libraries Division, Updates and New Initiatives, Train-the-Trainer Workshop, September 2004, Slide # 5, Slide #6; http://www.sl.universalservice.org/whatsnew/2005/042005.asp#042905.

In only one of the seven years of the program's operation, applicants with discounts lower than 70% have had access to internal connections funding. Applicants with discounts of 80% or less have been able to obtain internal connections funding in only three of the seven program years reported above. The difference between an applicant with a 60% discount and an applicant with an 80% discount may be as little as 1% fewer students who are eligible for the National School Lunch Program.[25] As the FCC found in its Third Report and Order in CC Docket No. 02-6, it was necessary to impose some restrictions on how much internal connections funding is made available annually to the neediest applicants because:

> [A]pplicants in the highest discount percentages have been able to repeatedly apply for and receive discounts for Priority Two services, while applicants in the lower discount bands have not received any Priority Two discounts because the annual funding has been exhausted. Moreover, nothing in our current rules expressly preclude entities with 90 percent discounts from replacing, on a yearly or almost-yearly basis, equipment obtained with universal service discounts, and transferring that equipment to other entities with lower discount percentages that otherwise would not receive funding for such equipment due to the exhaustion of the capped amount.[26]

In response to these concerns, the FCC imposed the limitation, effective in FY 2005 and later years, that applicants may apply for discounts on internal connections other than basic

[25] A 70% discount is available to applicants located in rural areas and whose percentage of NSLP eligible students is between 35% and 49%. An 80% discount is available to applicants located in urban and rural areas and whose percentage of NSLP students is between 50% and 74%. Frequently, the only real difference between an applicant with a 70% discount and an 80% discount is that the 80% discount applicant is more effective at counting the number of students eligible for NSLP.

[26] In re School and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, FCC 03-323, *Third Report and Order and Second Further Notice of Proposed Rulemaking* (Order Released December 23, 2003) at ¶ 9.

maintenance twice-every-five years.[27] This rule is supposed to allow more applicants to receive funding for internal connections while at the same time to continue to fulfill the FCC's goal of assuring that internal connections funding is provided to the neediest applicants.[28]

Since the two-in-five rule has gone into effect, there has been only one application filing window, FY 2005. While demand for internal connections at the 90% discount was markedly less in FY 2005 than for the prior year, the funding demand for discounts at the 80%-89% discount levels was greater than it has been in two of the last three years prior to FY 2005.

Funding Year	2002	2003	2004	2005		
Discount	Internal Connections	Internal Connections	Internal Connections	IC Other than Basic Maintenance	Basic Maintenance	Total IC 2005
80:89	$ 841,825,141	$ 615,451,909	$ 1,060,708,212	$ 866,556,337	$ 106,050,407	$ 972,606,744
90:90	$ 2,618,628,111	$ 2,116,154,524	$ 1,329,641,156	$ 635,149,445	$ 106,009,595	$ 741,159,040
Total	$ 3,460,453,252	$ 2,731,606,433	$ 2,390,349,368	$ 1,842,927,864	$ 240,065,890	$ 1,713,765,784

Source: USAC Yearly Filings of Demand Projections to FCC.

Based on the FY 2005 demand projection, it appears that the two-in-five rule will have little impact on the availability of internal connections funding for applicants with a discount of lower than 80% in FY 2005. Indeed, internal connections funding has been authorized by the FCC only for the 90% level, although the USAC board earlier adopted a recommendation that internal connections funding commence at the 87% discount level.[29]

While the FCC's goal in its promulgation of the two-in-five rule is laudable, SECA is concerned that based on the FY 2005 demand projection, the rule may not have the intended effect and will not reduce the amount of internal connections funding that the neediest

[27] *Id.* at ¶¶ 11-14.
[28] *Id.* at ¶ 14.
[29] http://www.universalservice.org/download/pdf/Sept30USACRelease.pdf; http://www.universalservice.org/board/schedule/nqagenda/sl/081705.asp

applications seek. In addition, as will be explained in detail below, SECA has substantial concerns regarding the complexity of the administration of the two-in-five rule and fears that the rule will hinder rather than facilitate the Administrator's ability to streamline its processing of forms and timely issuance of Funding Commitment Decisions Letters prior to July 1 of each program year. SECA, therefore, offers other alternative options for streamlining the application process for requesting internal connections discounts and which are intended to make these funds available to more applicants. These options are alternatives to one another and are intended to present different approaches to addressing the current problem resulting from the present rules of priority.

2. The Poorest And Most Technologically Needy Schools Should Have Primary Access To The Priority 2 Funds.

Since the program's inception, only funding year 1999 has had adequate priority 2 funding for all discount bands. There are many poor schools that are not currently in the highest discount bands that cannot afford to install internal connections without obtaining E-rate funding, yet these schools have not had adequate access to these funds. This has left many schools with more than 50% of their student population within the poverty designation without E-rate funding for internal connections.[30] Clearly, schools with an 80% E-rate discount have serious financial challenges and are deserving of E-rate funding for internal connections. For that matter, even a school that has a student population comprising 34% of students who are eligible for NSLP cannot be considered "well off" and financially sufficient such that these schools should be able to absorb all of the costs of internal connections without any E-rate assistance—especially when measured against other districts with a 90% discount that have

[30] Applicants with an 80% E-rate discount have at least 50% of their students who are eligible for NSLP. These applicants, however, have been able to obtain E-rate funding for internal connections discounts in less than one-half of the years that E-rate has been in operation.

obtained internal connections funding repeatedly since the program began. While the 80% school or district may not be classified as the poorest category of applicants under the E-rate discount matrix, if that applicant has been denied access to internal connections, surely that 80% applicant is more *technologically needy* than a 90% applicant that has successfully obtained internal connections funding already. Consequently, applicants with discounts lower than 90% and that have not had consistent (or any) access to internal connections should be considered a priority for obtaining Priority 2 discounts.

3. The Fairest Way to Make Internal Connections Funding Available to More Applicants is to Make a Modest Adjustment to the Discount Matrix for Priority 2 Funding Requests.

The single biggest beneficial change that the FCC could adopt to streamline the E-rate program and instill further protections to guard against waste, fraud and abuse is to adjust the discount matrix for priority 2 discounts, and establish 70% as the maximum discount.[31]

In the vast majority of cases in which criminal conduct was prosecuted for E-rate wrongdoing, the procurements at issue were for priority two internal connections services and equipment. As a result of the FCC's well intentioned effort to disburse internal connections to the neediest applications first, vendors targeted their marketing to these applicants and tried to oversell technology to them. The technology may otherwise be eligible for E-rate, but may be extravagant or unnecessary but because the applicant only has to pay for a fraction of the cost, the applicant nonetheless decides to purchase the equipment and to apply for E-rate to pay for the

[31] SECA has advocated for a decrease in the maximum discount for priority 2 services to 70% since 2002. *See, e.g.,* Comments filed on April 5, 2002 in CC Docket No. 02-6 (on behalf of the Council of Chief State School Officers); CCSSO Reply Comments in CC Docket No. 02-6 (May 6, 2002); SECA Ex Parte filed April 30, 2003; SECA Initial Comments in CC Docket No. 02-6 (July 18, 2003); SECA Reply Comments in CC Docket No.02-6 (August 19, 2003); SECA Initial Comments in CC Docket No. 02-6 (March 11, 2004) and Reply Comments (April 12, 2004).

vast majority of the costs. In other instances, representatives of vendors and applicants may collude and defraud the program. In each situation of wrongdoing, the substantial E-rate funding made available to the poorest applicants became an irresistible temptation that fostered unethical and/or criminal conduct.

While the Commission's goal to ensure connectivity in the nation's poorest schools and libraries should be fostered, this goal cannot and should not be implemented so as to condone unscrupulous conduct which threatens to undermine the integrity of the program for the overwhelming number of compliant applicants. Only when applicants are required to contribute a greater local match of their own resources than the 10% maximum currently required, will applicants more carefully make purchasing decisions based on what they need rather than what they can have.

In order to accomplish this discount modification, the maximum discount for priority 2 funding requests should be set at 70% for all applicants with a NSLP percentage of 35% or greater. Under the proposed revised rules of priority, should insufficient funds be available to fund all internal connections funding requests, discounts should be provided first to the applicants with the highest Priority One discount category. Should funds remain after funding all internal connections for applicants with a 90% Priority One discount, then internal connections should be funded for applicants with a 89% Priority One discount, and so on, until all available funds have been committed.

This proposal fosters more careful and responsible review and planning of internal connections procurements by all applicants in the current 80% to 90% discount levels, thereby reducing the potential waste, fraud or abuse. In addition, this proposal responds to concerns expressed by various stakeholders regarding the need for continued funding of internal

connections at all, after having the program in operation since 1999. By requiring more resources from the applicant as part of the local match, E-rate funding will be able to be spread among all applicants including those that have not previously had access or had only limited access to this funding.

4. As an Alternative to the 2/5 Rule, Applicants Might Be Permitted to Apply for Internal Connections Funding on a Rotating Basis.

Establishing rotating funding bands would allow funding for all applicants regardless of discount percentage. In lieu of the two-in-five rule, the FCC could establish a three-year schedule to rotate the allocation of internal connections funding among all discount levels, depending on the amount of available funds and the associated demand. For example, in the first year of the three year schedule, internal connections FRNs would be processed and funded in the manner that is currently in place today. In the second year, however, rather than funding the applicants with the highest discount levels, priority would be given to applicants in the next highest discount band which was not funded in the first year.[32] In the third year, discounts would be available to the applicants with discount levels that had not been funded in the two prior years. This funding cycle would continue until all applicants had one year in which their discount band was the fully funded for internal connections. In the following year after the 20% discount level has been funded, funding would begin again at the top percentage band. This approach has the added benefit of allowing applicants to schedule and predict when they will be likely to receive internal connections discounts.

[32] If in the first year of the three year cycle, internal connections FRNs were funded down to the 87%, the second year would begin with funding internal connections FRNs at the 86% discount level, and fund all applications with decreasing discounts until all available funds were exhausted.

This proposal appears to be similar to the 2/5 rule, but it is fairer, guarantees internal connections funding for applicants in one out of three years (which will allow applicants to provide better technology planning and long range planning of needs). But equally as important to these advantages is the fact that it eliminates the problems with the current 2/5 rule. This 2/5 rule has penalized schools and libraries that are using client access licenses that must be renewed annually or leases for equipment that were in place prior to 10/13/2004 because client access licenses are annual, recurring expenses, yet not exempted from the 2/5 rule as were basic maintenance recurring expenses. In addition, the 2/5 rule penalizes consortia that purchase head-end equipment for the consortium network because under the current rules, all entities that ultimate receive the service that is being transmitted over the network are counted as receiving IC equipment in that year, and thus a 2/5 "strike."

D. SECA Does Not Support A Formulaic "One Size Fits All" Approach for E-rate.

While a formulaic approach may be appealing because it sounds simpler and more streamlined, SECA is concerned that the solution may be worse than the problem that the FCC is seeking to "cure." A formulaic approach does not dispense with the need for applicants to submit information and data to the E-rate Administrator and it does not dispense with the need for the Administrator to engage in complex data analysis and calculations. This approach simply shifts the focus from the current application process to a data collection that applicants nevertheless will be expected to complete. The Administrator currently does not have the ability to calculate the average price or average cost of services – which a formula would necessarily require. Moreover, a formula does not take into account the regional price differences that rural, sparsely populated applicants incur to obtain telecommunications, Internet access and internal connections services. Further, a formula approach contains little if any safeguards to address

concerns about waste, fraud and abuse. While in concept such an approach may be attractive, its implementation is fraught with complications and complexities, and the transition from the current system to a new system is likely to be more problematic than fixing the current system.

E. The Form 479 and Letter of Agency Requirements Should be Combined into One OMB-Approved Form.

Because of the representative capacities they serve, lead consortium members have additional requirements with which they must comply in order to apply for E-rate. The E-rate Administrator is responsible for confirming that each consortia member has authorized the lead consortia member to file for E-rate discounts on behalf of each member.[33] USAC's authority to require a Letter of Agency to be executed by each consortia member, to confirm that the lead consortia member is authorized to file the E-rate application on behalf of the members, has been upheld by the FCC in the Project Interconnect and the Clackamus ESD Appeal decisions. In each case, the FCC has confirmed that the E-rate Administrator may require letters of agency from consortia members, to assure that the members know that the E-rate application has been filed and that the consortium members have sufficient resources to make effective use of the discounts.[34]

Neither in its regulations nor in its Orders has the FCC ever prescribed the specific contents of information that must be contained in a Letter of Agency. Indeed, such a prescribed information collection surely would require the approval of the Office of Management and Budget. Yet, the E-rate Administrator has undertaken this additional step, and has issued

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[33] In re Request for Review of the Decision of the Universal Service Administrator by Project Interconnect, Brooklyn Park, Minnesota, CC Docket No. 96-45, File SLD-146858, 146854, DA 01-1620 (Order Released July 11, 2001) ("Brooklyn Park Appeal"); In re Request for Review of the Decision of the Universal Service Administrator by Clackamus Education Service District, Marylhurst, Oregon, CC Docket No. 96-45, File SLD-147541, DA 01-2230 (Order Released September 27, 2001) ("Clackamus ESD Appeal").

[34] Project Interconnect Appeal at ¶¶ 8, 10.

guidance on its web site that mandates that certain information items must be contained in each LOA:

- The name of the person filing the application (the consortium leader or consultant)
- The name of the person authorizing the filing of the application (the entity who will receive discounted services, such as a consortium member)
- The specific timeframe the LOA or authorizing document covers (for example, the E-rate Funding Year 2003)
- The signature, signature date, and title of an official who is an employee of the entity who is authorizing the filing of the application (the entity who will receive discounted services, such as a consortium member)
- The type of services covered by the LOA or authorizing document (such as "Internet services" or "networking equipment").

http://www.sl.universalservice.org/reference/letters.asp.

The web site guidance also states:

> In certain situations, other documentation may be accepted as proof of authorization. For example, for consortium applications, the consortium lead member must either collect Letters of Agency from each consortium member or be able to provide some other proof that each consortium member knew it was represented on the application. Consortia which have a statutory or regulatory basis and for which participation by schools or libraries is mandatory must be able to provide documentation supporting this certification, including copies of the relevant state statute or regulation.

While this caveat is published, PIA's implementation of the SLD's guidance has been to require the mandatory elements of information to be contained in each LOA. In fact, in FY 2005, large consortia applications have been denied on the basis that the LOA did not itemize the services in sufficient detail to the Administrator's satisfaction that the consortia member authorized to be included on the E-rate application. In other words, the E-rate Administrator has exercised authority that was not expressly approved by either the FCC or OMB to prescribe the specific information elements to be contained in a LOA.

The first time in which the E-rate Administrator itemized the mandatory elements of a LOA was in the training presentations for FY 2005 which were circulated to the training participants in September 2004. The information in these training presentations – especially the new information not previously announced -- apparently has been elevated to the level of program requirements. The training presentations appear to have been posted to the SLD web site on December 2, 2004, and the LOA web site guidance was not posted to the SLD web site until January 10, 2005.[35] The FY 2005 window closed approximately five weeks later – which meant that for a statewide consortium comprising literally hundreds of districts and, in some cases non-public schools and public libraries as well, the lead consortia member had to scramble to try to obtain the correctly formatted LOAs from each member before submitting their Form 471 applications by February 18, 2005 – which in many cases was impossible to accomplish.

In contrast to the manner in which the LOA issue has been handled, the FCC and E-rate Administrator appropriately recognized that there was a need for a standardized information collection for consortia applicants concerning the requirements of the Children's Internet Protection Act. As a result the FCC developed a form – with OMB approval – to require each consortia member to complete: FCC Form 479, Certification By Administrative Authority to Billed Entity of Compliance With the Children's Internet Protection Act. The lead consortia member collects each Form 479 from each member in order to be able to certify on the Form 486 that all members of the consortia are in compliance with CIPA.

The LOA requirements should be combined with the CIPA compliance certification and one OMB-approved form should be devised for consortia members to complete. In fact, it

35 See http://www.sl.universalservice.org/reference/letters.asp ("Content last modified January 10, 2005); and http://www.sl.universalservice.org/reference/Presentations2004.asp ("Content last modified December 2, 2004).

makes little sense and has caused unnecessary confusion and unfairness by NOT prescribing a standard OMB-approved form for the LOA. The combined form should be made available in a PDF format that can be completed online and certified on line with a PIN; and is capable of being emailed to a designated email address. The instructions to the form should explain that the designated email recipient for the completed form should be the lead consortia member's email – and that the member should check with the consortium lead to obtain this information. In addition, the E-rate Administrator should retain a copy of the completed form in its database so as to make it easier for the Administrator to verify that LOAs have been executed by each consortia member. The E-rate Administrator would then contact the lead consortia member to obtain copies of LOAs that are not on file with the Administrator.

F. The Technology Plan Requirements for E-rate Should Not Be Separate From the Requirements Prescribed in Other Federal Programs. E-rate Technology Planning Requirements Need To Be Revised.

In paragraph 59 of the Fifth Report and Order, the Commission stated that "We agree with the virtually unanimous view of commenters that the Commission's technology plan requirements should be harmonized with the technology planning goals and requirements of the U.S. Department of Education and the U.S. Institute for Museum and Library Services." The current NPRM is seeking guidance on how this can be accomplished.

SECA believes that technology planning is very important but that the long-range educational technology plan is not useful in monitoring year-to-year compliance with the E-rate program. However, numerous applicants are denied every year for minor infractions of the technology plan requirement, with no opportunity for the applicant to cure or fix the mistake. There should not be a "zero tolerance" policy when it comes to E-rate applicant mistakes, and certainly not when it comes to technology plans. Instead of adding requirements or additional

monitoring to an already difficult technology planning process, SECA suggests that any additional information needed by E-rate can more accurately be obtained and confirmed from other existing and more authoritative sources.

SECA believes that if a technology plan is accepted by the US Department of Education (USDoE) or the U.S. Institute for Museum and Library Services, it should also be accepted for the E-rate program. Very rarely should any additional follow-up should be necessary. In the following paragraphs we will make the points that: 1) the twelve requirements for the USDoE technology plans required in Title II, Part D of the No Child Left Behind Act (NCLB) are very similar to the five requirements for the E-rate technology plan; 2) additional information and assurances that the E-rate process requires can be collected from more timely and authoritative sources than the long-range educational technology plan; and 3) placing too much burden on volunteer (not reimbursed) technology plan approvers may force them to reconsider their willingness to participate in the program.

E-rate has five elements that must be included in the technology plan, while the USDoE has 12 required components. The following chart shows the 5 required E-rate components in the left-hand column with similar USDoE requirements listed in the right-hand column.

E-Rate Requirements for Technology Plans	**NCLB Requirements for Technology Plans**
1. The plan must establish clear goals and a realistic strategy for using telecommunications and information technology to improve education or library services	(2) A description of the applicant's specific goals for using advanced technology to improve student academic achievement aligned with challenging State academic content and student academic achievement standards.
2. The plan must have a professional development strategy to ensure that staff know how to use these new technologies to improve education or library services;	''(4) A description of how the applicant will— … ''(B) provide ongoing, sustained professional development for teachers,

E-Rate Requirements for Technology Plans	NCLB Requirements for Technology Plans
	principals, administrators, and school library media personnel serving the local educational agency, to further the effective use of technology in the classroom or library media center, including, if applicable, a list of the entities that will be partners with the local educational agency involved in providing the ongoing, sustained professional development.
3. The plan must include an assessment of the telecommunication services, hardware, software, and other services that will be needed to improve education or library services;	''(5) A description of the type and costs of technologies to be acquired under this subpart, including services, software, and digital curricula, and including specific provisions for interoperability among components of such technologies.
4. The plan must provide for a sufficient budget to acquire and support the non-discounted elements of the plan: the hardware, software, professional development, and other services that will be needed to implement the strategy; and	''(6) A description of how the applicant will coordinate activities carried out with funds provided under this subpart with technology-related activities carried out with funds available from other Federal, State, and local sources. ''(1) A description of how the applicant will use Federal funds under this subpart to improve the student academic achievement, including technology literacy, of all students attending schools served by the local educational agency and to improve the capacity of all teachers teaching in schools served by the local educational agency to integrate technology effectively into curricula and instruction.
5. The plan must include an evaluation process that enables the school or library to monitor progress toward the specified goals and make mid-course corrections in response to new developments and opportunities as they arise. "	''(11) A description of the process and accountability measures that the applicant will use to evaluate the extent to which activities funded under this subpart are effective in integrating technology into curricula and instruction, increasing the ability of teachers to teach, and enabling students to meet challenging State academic content and student academic achievement standards.

In examining the above table, one can see substantial similarity. In the past, the SLD has accepted technology plans created for the USDoE, and currently states in the reference area on their web site, "A school, school district, or education service agency that has developed a plan approved under a Technology Literacy Challenge Fund initiative, has an approved plan for purposes of the Universal Service Program." (http://www.sl.universalservice.org/apply/step2.asp#2iii).[36]

Therefore, SECA suggests that while the technology plan should show sufficient planning, compliance should be certified on the Form 471 and applicants should never be denied E-rate funding due to perceived omissions from an applicant's "state approved" technology plan.

Finally, SECA would like to point out that while there is tremendous benefit to schools and libraries from the E-rate program, technology plan approvers do not receive reimbursement from the E-rate program for their services. The cost of coordinating technology planning and approval is coming from other federal and state programs. Some of those programs, such as Enhancing Education Through Technology, are facing large funding reductions and organizations are being forced to scale back on services. Even one case where an applicant is denied E-rate funding based on a technology plan that has already been approved by a state would put that state in a very awkward position. As states have to prioritize, they may well wonder whether it is worth it to approve technology plans for E-rate. Thus, SECA urges the Commission to continue to require the educational technology plan for long-range strategic planning, but not use it as an instrument for year-to-year E-rate compliance or as a reason to deny E-rate funding.

[36] Note: The Technology Literacy Challenge Fund was USDoE's educational technology program in the previous authorization of ESEA and was very similar to the current program, EETT.

IV. PERFORMANCE METRICS SHOULD EVALUATE WHAT TECHNOLOGY APPLICATIONS AND SERVICES CAN BE PROVIDED TO APPLICANTS.

The purpose of the E-rate program, as stated in the Telecommunications Act of 1996, is to provide access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms and libraries. Given this statutory purpose, we believe the appropriate performance goal and subsequent measure of progress toward this goal should be tied to providing access to advanced telecommunications and information services. As satisfying as it may seem to have a finite goal of having every school "connected," the actual purpose of the program is to provide "access" to services, not to simply be "connected."

Access to advanced telecommunications and information services is never a finished product. Just as we all know our transportation infrastructure needs constant upgrades (e.g., roads, bridges, highways and Interstates), the technology that runs with and through the nation's electronic infrastructure also needs constant upgrades. (Moore's Law states that processing speeds double every 18 months). As the number of cars in a growing city increases, so does the need for more traffic lanes to accommodate the demands placed upon the transportation infrastructure. If more lanes are not added traffic grinds to a halt. Telecommunications in a school is no different. As the amount of "traffic" and demand for access grows (types of bandwidth-intensive applications and number of simultaneous users), so grows the demand for increased bandwidth.

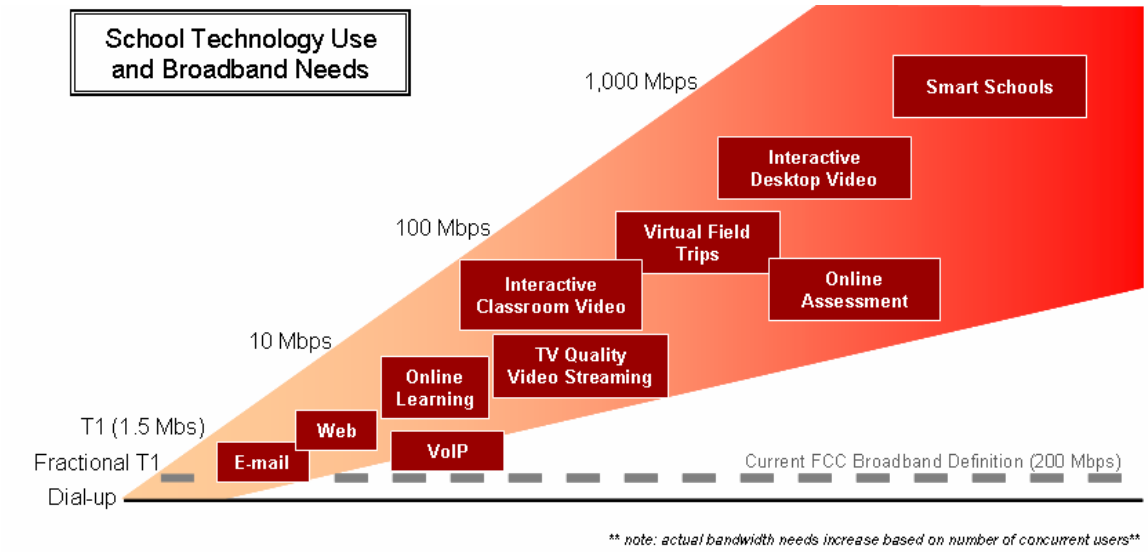
The evidence of the ever-growing requirements for access is readily evident in American business. High-tech businesses are no longer satisfied with just being "connected" with 56kb dial-up access. Competition with the rest of the world requires that high-tech business

bandwidth capabilities increase in order to survive and thrive. If policy makers think that all educational institutions are adequately "connected," we need only to look at competition in other parts of the world. Countries with emerging top-notch educational institutions are not standing still and saying connectivity has been achieved. Other emerging economies are capitalizing on increasing bandwidth (wired and wireless) in order to make sure educational access for their students continues to grow.

What were standard access speeds to typical school buildings eight years ago when E-rate first began (e.g. 56kb connection to a school) are no longer sufficient. While 56kb was probably even inadequate for an entire school building in 1996 when the Act was first passed, the minimal bandwidth needed for "access" has greatly increased in 2005. A minimal bandwidth requirement for an individual school is no longer a meaningful concept. For example, if a school is bringing four simultaneous two-way interactive videoconferencing courses into a high school (e.g. Advanced Placement Statistics, College physics, French and professional development for teachers) the school's minimum bandwidth needs are very different from a school bringing eight simultaneous two-way interactive videoconferencing courses.

As can be seen in the graph below, as educators implement ever more effective teaching strategies and technology, the connectivity speed requirements for access to each of these advanced telecommunications and information services will continue to grow. If schools are connected at a slow speed, they cannot reach their goal of having access to advanced telecommunications and information services.[37]

[37] See also Appendix A to these Comments for more illustrations of the ways in which technology is incorporated into education.



The reason so many of the education applications in the graph are possible is due to three main factors or "triple convergence." Triple convergence, as cited in Thomas Friedman's book, The World is Flat (New York: Farrar, Straus and Giroux, 2005, chapter three) involves the following elements (adapted below for education):

- Advances in more affordable telecommunications (ever increasing bandwidth supported through E-rate);
- The spread of affordable technology such as personal computing devices, especially small, portable laptops and handhelds (not supported by E-rate funds);
- The emergence of software and Internet applications that make it possible for students and educators to access the resources of the world (software such as learning platforms, e.g. Blackboard, eCollege, as well as productivity/conferencing software such as Outlook, NetMeeting; not supported by E-rate funds).

As teachers and schools become more effective in providing quality learning experiences for students, the need for bandwidth and connectivity capacity grows. And the larger the school, the more students and teachers served, the greater the amount of bandwidth required.

In order to measure progress toward "access," we urge the Commission to use consistent metrics across all the customer bases for telecommunications and Internet. A separate set of connectivity metrics for education should not be applied. Instead the FCC should look at the

larger context of broadband and Internet penetration to various customer bases including education. Service providers would be in the best position to accurately provide consistent metrics across all customer bases.

One suggestion for measuring performance is through actual usage of bandwidth in schools and libraries. The School Technology Use and Broadband Needs graph (above) is one example of equating bandwidth to current technologies being used in schools and libraries. E-Rate service providers supplying bandwidth to schools and libraries have the ability to track and report bandwidth usage at anytime. Additionally, data provided from bandwidth usage reports provide guidance to applicants for technology planning and implementation of new applications.

V. THE COMMISSION SHOULD ADVISE CONGRESS THAT A PERMANENT EXEMPTION FROM THE ANTI-DEFICIENCY ACT IS VITAL TO ASSURE THE CONTINUITY OF DISBURSEMENTS UNDER ALL USF PROGRAMS.

The Commission determined in 2004 that the Funding Commitment Decision Letters that USAC issues to E-rate applicants and service providers were "obligations" in the federal budgetary sense and that the Antideficiency Act (ADA) applied, that is, that these obligations must be covered by cash. The effect of those decisions was to halt issuance of Commitment Letters for several months last year while USAC accumulated the cash to cover new Letters that were ready to be issued. Congress passed and the President signed legislation in December 2004 that waived applicability of the ADA to the USF through December 2005. Congress is currently considering legislation to provide a permanent exemption.

It is imperative that the FCC take the lead in supporting a top priority of applicants—a permanent exemption to Universal Service Fund from the Antideficiency Act. This exemption is required because of the annual disruption that occurs when applicants and service providers must

wait for Congress to enact a temporary waiver. When the current waiver expires, SECA is extremely concerned that Funding Commitment Letters be suspended as they were last year. As school districts are relying on these funds, it becomes a financial burden to districts when there are no or late commitments. Another freeze would be devastating to the entire E-rate program as it would show applicants that they cannot depend on program credibility or continuity of funds.

There was discussion last year of a pre-commitment notification letter that might be issued after review of an application was completed but before there was cash to cover an actual commitment. SECA wants to ensure that the Commission does not view this as an alternative to a further ADA waiver or exemption. While such a notification letter would be a good indication that funding would be forthcoming in the future, it would not be sufficient to proceed with installation of products or delivery of services in cases where the applicant could not afford them without E-rate support. Until the Commitment Letter is issued, we would expect that applicants would not order the commencement of service and service providers would not begin providing discounts. In fact, many service providers today refuse to begin discounts until the Commitment Letter is issued, the applicant files a Form 486, and the service provider receives a Form 486 Notification Letter.

VI. INDEPENDENT AUDITS SHOULD NOT BE MANDATED.

Small applicants will not be able to justify the expense and, thus, would drop out of the E-Rate program if these were required. In addition, independent audits alone will not deter waste, fraud, and abuse and likely cost much more than the abuse or fraud that is being identified during the audit. The majority of states now require independent audits for public schools and libraries;

however, the process and monetary threshold for audit requirements vary among states and federal funding they now receive.

If additional audits are necessary, we recommend that the FCC consider using the audit structure that is currently in place at each state and provide E-Rate training to these auditors charged with the responsibility of auditing schools and libraries. The FCC should urge USAC to reach out to state auditors to provide more information on E-Rate funding guidelines.

Further, as part of its 'expanded outreach initiative', USAC is conducting site visits of1000 E-rate applicants each year. These visits are supposedly designed to provide USAC an opportunity to see E-rate funds in use, assess USAC's outreach and education efforts, observe best practices in the field, and ensure that program funds are being used in compliance with regulatory requirements. In light of the infancy of the site visit program, we urge the Commission take a wait-and-see approach to evaluate the results of site visits before imposing additional audit requirements on program beneficiaries.

VII. THE FCC SHOULD RESOLVE THE OUTSTANDING ISSUES CONCERNING USAC'S PROPOSED AUDIT RESOLUTION PLAN.

A. Introduction

In December, 2004, the FCC sought comments regarding the USAC's Proposed Audit Resolution Plan for Schools and Libraries Support Mechanism Auditees (Audit Plan) which was submitted in response to the FCC's directive in its Fifth Report and Order.[38] To date, no final Audit Plan has been adopted and we therefore would be remiss if we did not reiterate our comments on this important topic.

[38] CC Docket No. 02-6, FCC 04-190 (released August 13, 2004)(referred to as "Fifth Report and Order").

We commend the FCC and USAC for expending the resources necessary to develop a comprehensive process for addressing the audit findings contained in audit reports. By establishing a unified audit resolution plan, audited parties should be subject to the same set of resolution procedures regardless of which organization conducted the audit. We fully support the FCC's and SLD's efforts to assure that applicants and service providers are in compliance with the E-rate program rules. We recognize that audits of beneficiaries and service providers are an important component in assuring that the integrity of the E-rate program is maintained and preserved. We are well aware of the detrimental effect of adverse publicity concerning instances of fraud, waste or abuse of E-rate funds. These non-compliant stakeholders raise concerns that reverberate through the program about the accountability for the program's vital resources. We concur with the FCC's assessment that audits will help to insure that the E-rate resources are monitored sufficiently to thwart fraud, waste or abuse.

At the same time, we implore the Commission to establish fair procedures that concentrates the available audit resources on identifying ambiguities in the program rules that prompt the FCC to issue the appropriate guidance and clarification, and encourages compliance with program rules. Based on our collective experiences of interacting with applicants and other stakeholders on a daily basis, we are firmly of the view that the vast majority of applicants work very hard to comply with the program rules. In most instances where an applicant may be out of compliance, the applicant is guilty of nothing more than a mistake committed in good faith, not an intentional misdeed.

While the USAC Audit Plan is a good first step in developing consistent audit resolution procedures, the Plan is sorely lacking in details and information that is critical to assure that

applicants are afforded an appropriate opportunity to provide their views when SLD attempts to resolve a beneficiary audit.

B. Audited Entities Must Have The Right To Submit Comments To The Draft And Final Audit Reports And These Comments Should Be Submitted To The USAC Board.

The Fifth Report and Order specifically directed that USAC's Audit Resolution Plan must encompass all audits conducted by USAC's internal audit department, independent public accounting firms under contract with USAC, or government audit organizations. Moreover, the FCC prescribed that the audit resolution plan must be consistent with government auditing standards. Specifically, the FCC directed:

> USAC's audit resolution plan should be consistent with government auditing standards by, for example, providing a formal process for informing audited beneficiaries of the audit results (*e.g.*, submitting a draft audit report to the audited beneficiary for comment, affording an opportunity to provide formal written comments to the final audit report, etc).

This critical protection, e.g., the establishment of a formal process to discuss and receive written comments from the audited entity on the final audit report, is not sufficiently detailed in the Audit Plan. The only mention of providing the audited entity with an opportunity to comment on the draft audit report is the following sentence: "The auditors perform the fieldwork, draft audit findings, discuss audit findings with the applicant, and draft the report." There is absolutely no mention – as the FCC directed – that audited entities be given the opportunity to submit written comments to the draft audit report. This omission should be corrected, and the audit plan should be revised so as to confirm that audited entities must be given a sufficient opportunity to submit written comments to the draft audit report.

Likewise, in the section explaining how it proposes to resolve audit findings, the SLD indicates that there are three possible final outcomes to each audit finding: (1) audit finding is

cleared; (2) finding is determined not to be a rule violation; or (3) finding is determined to be a rule violation. The audit plan does not make clear whether SLD has notified the audited party of the proposed disposition of each finding prior to finalizing the disposition of each finding. In other words, it is not clear whether the draft audit report—which definitely should be shared with the audited party—contains a proposed disposition of each finding. It is imperative, therefore, that the USAC audit plan be revised so as to make clear that in addition to being required to share the draft audit report with the audited party, the SLD is explicitly required to share the proposed disposition of each audit finding with the audited party so that the audited party has an opportunity to comment.

The proposed approach for presenting the audit report to the USAC Board of Directors similarly lacks the specificity required to assure that the audited party's comments are circulated to the Board. The audit plan indicates that the SLD Internal Audit Division will prepare an executive summary of each audit report prepared by outside auditors, and the SLD will prepare a management response to the audit report.

Importantly, however, there is no mention of the opportunity for the party who was subject to the audit to prepare and submit the party's response to each audit finding. Again, this is patently unfair because it fails to allow the "voice" of the audited party to be heard (or reviewed) by the Board of Directors. At a minimum, USAC should be required to circulate to the Board the audited party's response or comments to the draft and final reports in order for the Board to be informed of *all* relevant information of *all* stakeholders to the audit—and not just the information prepared by USAC and/or the auditor.

C. Audit Findings Of Program Rule Violations Must Be Based On The Rules Then In Effect During The Time Period Under Review In The Audit.

USAC's audit plan indicates the possibility that an audited entity could receive a finding of program non-compliance based on violations of rules that were not in effect during the time period under review in the audit. USAC states, "For example, if an audit report contains a finding based on a rule violation, but the rule was not in effect during the relevant year, that finding will be clarified in the report."

SECA strongly urges that the FCC and SLD should take care to inform auditors of the program rules and FCC Orders that were in effect during the time period being audited. These rules and Orders should serve as the basis for conducting an audit. It makes little sense to conduct a compliance audit using rules and orders promulgated *after* the time period covered in the audit. These later materials were not available to inform and guide the audited entity's behavior during the time period being audited. If these later materials are used to evaluate the audited entity's behavior, the auditors are unfairly holding the audited entity to a higher standard of compliance retroactively.

Moreover, the rules and orders that the FCC promulgates concerning the E-rate program typically are applied on a prospective basis only. If these later rules and orders are used to gauge whether an audited entity committed a rule infraction during a prior period, the FCC rules and orders will be given retroactive effect in violation of the clear language of those orders. For example, prior to the close of the Funding Year 2004 application filing window, the FCC clarified that dark fiber no longer was eligible for E-rate discounts. During prior funding years, the FCC and SLD had determined that dark fiber service was eligible for discounts. If an applicant was audited for the Funding Year 2003, according to the USAC audit plan, the

applicant could receive an adverse finding concerning its dark fiber agreement since current program rules do not allow dark fiber service to be eligible for discounts.

The USAC audit plan seems to suggest that this finding would be clarified in the audit report and determined not to be a program rule violation. It does not make any sense, however, for this situation to produce *any* finding – even if the finding is cleared – because the program rule was not in effect during the time period being audited.

Not even a clarification or clearance of this finding will dispel the implication that an applicant did something wrong – when in fact the applicant did nothing wrong by virtue of obtaining E-rate discounts on a dark fiber service agreement prior to Funding Year 2004. The Commission should keep in mind that the dark fiber scenario is just one example of the unfair result of the SLD's proposed audit plan. This unjust result will occur any time the auditors make a finding based on rules and orders promulgated after the time period that is being audited, and that are given retroactive application. The scope of the audit is unfairly enlarged, and the auditors' valuable resources are not expended wisely, when an audit is conducted using later issued FCC orders and rules.

Applying current rules to a prior period in time penalizes applicants who were not clairvoyant and could not predict and comply with future program rule clarifications. The FCC should correct and clarify that auditors should rely on the program rules and orders that were issued and available during the time period for which an entity is audited.

D. The SLD Should Be Required To Resolve Audit Findings Using Information That Is Currently Available To The SLD Without Seeking Any Clarification Or Policy Guidance From The FCC.

The proposed Audit Plan indicates that in making a determination of whether an audit finding is a program rule violation, the SLD intends to seek guidance from the FCC's Wireline

Competition Bureau (WCB) if the SLD is uncertain whether a particular situation constitutes a rule violation.4 SECA firmly believes that the SLD should make its resolution based on the same information that was available to E-rate stakeholders during the time period under review in the audit. It is patently unfair for the SLD to confer with the FCC, and to then conclude—based on the additional clarification provided by the FCC, that a program rule was violated. Indeed, this scenario illustrates the potential inequity of the SLD's application of rules or policy clarifications which were provided *after* the time period being audited. Surely if the SLD itself requires policy guidance and clarification of the rules from the FCC, applicants and other entities cannot be held accountable for complying with whatever new policy guidance that the FCC provides to the SLD. Yet this is the precise outcome that is contemplated to occur under the USAC proposed audit plan. Engaging in 20/20 hindsight in determining that a particular action or conduct constitutes a program rule violation does little to encourage program compliance and instead converts the auditing process into a quest to find violations.

E. The FCC And The SLD Should Clarify The De Minimis Standard Governing SLD's Actions For Recovery Of Improperly Disbursed Funds.

The Fifth Report and Order recognized that there is some threshold amount of improperly disbursed funds below which it is not economically feasible for USAC to seek recoupment. As the FCC stated:

> We conclude that it does not serve the public interest to seek to recover funds associated with statutory or rule violations when the administrative costs of seeking recovery outweigh the dollars subject to recovery.

Accordingly, the FCC directed USAC to not seek recovery of such "de minimis" amounts. The FCC further directed USAC to "to provide the Wireline Competition Bureau and the Office of

Managing Director sufficient information regarding the administrative costs of seeking recovery of improperly disbursed funds so that a *de minimis* amount can be determined."

To SECA's knowledge, there has been no public announcement of the *de minimis* amount and there is no mention of this requirement in the USAC audit plan. So as to conserve and funnel USAC's limited resources, SECA encourages the FCC to resolve this matter promptly as part of the FCC's review of the USAC audit plan. While not privy to USAC's costs of seeking recovery of improperly disbursed funds, SECA members are familiar with the multi-step procedure that is contemplated. SECA suggests that the *de minimis* floor should be set not lower than $2,500. This amount is rather conservative given that the following steps (as well as other work efforts that must be purposefully withheld from public view such as coordinating communications with law enforcement officials) may be required in seeking recovery of improperly disbursed funds:

- Quantification of the amount of improperly disbursed funds based on final audit report.
- Prepare revised funding commitment decisions letter to implement recovery of improperly disbursed funds.
- Respond to any appeal that a recipient of a recovery of improperly disbursed funds (RIDF) may file.
- Issue demand notification letters.
- Refer matter to FCC for collection and notify FCC that the recipient of the RIDF letter should be put on red light.
- Prepare semiannual report of SLD activities relating to audits including RIDF actions. (A proportionate amount of these costs should be allocated to each separate RIDF action).
- Prepare advisory reports to apprise USAC board of RIDF activities. (A proportionate amount of these costs should be allocated to each separate RIDF action).

Although each of these steps may not be required for each RIDF action, on average, the time required is significant, and the associated work effort would appear to be valued at a minimum, $2,500.

F. The SLD Should Be Prohibited From Issuing Demand Letters For Recovery Of Improperly Disbursed Funds While An Appeal Is Pending.

One of the issues on which the SLD has requested FCC guidance is whether the SLD should proceed to issue a demand letter if, after the SLD issued a notification letter advising an audited party of the SLD's conclusion that a program rule violation was committed which resulted in the SLD's improperly disbursing funds, an appeal is taken of the SLD's notification letter. This issue has very significant implications because once a demand letter is issued, an applicant or service provider risks being put on "red light" if the amount demanded is not paid back to SLD promptly. The SLD's proposed audit plan appropriately suggests that it will refrain from issuing a demand letter if an appeal is filed in response to the SLD's notification of improperly disbursed funds letter. Specifically, the audit plan suggests that if no appeal is received to the notification letter, then SLD will issue a demand payment letter. An appeal filed by an audited party should stay the issuance of a demand payment letter until after the appeal is resolved. This protection assures that the SLD's actions will be reviewed by the FCC prior to the audited party being put on red light.

VIII. SERVICE PROVIDER AND CONSULTANT CODE OF CONDUCT

The Commission seeks comments on whether the FCC should "establish certain criteria, such as quality standards or standards of conduct, for participating service providers and consultants." We believe that it is not the responsibility of the Commission to set quality standards or standards of conduct for the business community. Such standards could be recommended by the FCC and publicized to the E-rate community, but they should not become a threshold requirement for E-rate participation or funding.

IX. STATE AGENCIES COORDINATING E-RATE EFFORTS SHOULD RECEIVE FINANCIAL SUPPORT FOR THEIR WORK.

SECA believes that a critical component of the E-rate program is outreach to, and communication with, local applicants. Yet, with the exception of modest efforts this fall to reach a few hundred applicants nationwide, the SLD has done no direct outreach to applicants since 1999. Instead, it relies on state coordinators to work directly with applicants in their respective states. Thus, state agencies and their state coordinators are an essential asset helping to assure the success of this program. Below are just a few examples of how state agencies and their coordinators work with their applicants. On a continuing basis, coordinators:

- Help applicants understand the complex rules and application process
- Communicate the numerous program deadlines and timelines to the schools and libraries.
- Conduct workshops and training sessions for applicants.
- Maintain web sites and email lists to provide guidance to applicants.
- Read, evaluate and approve technology plans.
- Serve as arbiters between applicants and SLD's Program Integrity Assurance (PIA) staff.
- Coordinate the collection of lunch discount data.
- Consult with applicants on whether a denial of an application is worthy of appeal.

The state coordinators understand not only the E-rate program, but also unique conditions and issues within their states—for example, addressing issues of State Master Contracts. They are advocates for applicants who often feel lost in the vast E-rate bureaucracy. SECA knows of no other federal program that relies so heavily on state education and library agencies but allocates $0.00 for all their work. And, whether it is apparent to the Commission or not, the first line of defense to help prevent waste, fraud, and abuse is the E-rate support offered to applicants by state education and library agencies.

In consideration of the critical but unrecognized work state agencies do, SECA suggests the FCC consider, at a minimum, reimbursing at least some of the costs for all the time and work now done by state agencies at state expense. Our estimate for this cost is about $2.75 million annually, barely more than one-tenth of one percent of the program's appropriation. Considering that the FCC is now paying far more than this to conduct applicant audits, SECA believes that this modest investment "up front" will more than pay for itself in reducing waste, fraud and abuse.

X. CONCLUSION

SECA respectfully requests that the Commission adopt an Order consistent with the recommendations set forth in these Comments.

Respectfully submitted,

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Dated: October 17, 2005