



August 4, 2006

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6
Comments to Proposed Eligible Services List, Public Notice Released July 21, 2006 (FCC 06-109)

Dear Secretary Dortch:

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

In addition to the roles as State E-rate trainers and coordinators, most SECA members also provide the following services to the program: technology plan approval; applicant verification assistance to the

Administrator's Program Integrity Assurance (PIA) Division; verification to the Administrator of applicable state laws confirming eligibility of certain applicant groups; contact of last resort to applicants by the Administrator; and verification point for free/reduced lunch numbers for applicants.

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

I. Webhosting (Proposed ESL, p. 9)

We strongly support the new proposed language which cautions applicants and vendors that software applications and content editing features that may be packaged with eligible web hosting service are not eligible for E-rate discounts and must be cost allocated from E-rate funding requests. These additional features are content-based services which fall outside the purview of basic Internet access. We have been concerned that applicants may have mistakenly been under the impression that all services marketed under the label of webhosting were eligible for E-rate discounts, despite the fact that some of these services were content-based, value added features that went beyond basic webhosting. The proposed language removes this ambiguity and clearly puts all stakeholders on notice concerning the boundary of eligible webhosting service and ineligible content-based services and software applications.

II. Wireless Internet/E-mail Access Should Be Eligible For E-rate Support. (Proposed ESL, p. 8)

The Proposed ESL states that wireless Internet and email access is eligible for E-rate only to the extent that the wired version of these services is eligible for discounts:

A wireless Internet access service is eligible under the same provisions as wired access to the Internet if the wireless service is the most cost-effective means of accessing the Internet or obtaining Internet-based e-mail at eligible locations.

The ESL goes on to state that an additional requirement for wireless Internet/email eligibility is an "auditable monitoring system is in place that provides a way to allocate between eligible and ineligible uses."

Both of the quoted passages from the ESL regarding portable wireless Internet access from portable devices that also provide wireless cell service --which are contained in both the currently effective and proposed ESLs-- are extremely problematic to administer and implement. . The approach in the ESL to highly regulate and restrict the eligibility of this service to very narrow circumstances is an overly rigid and unnecessarily literal construction of prior FCC Orders governing the definition and interpretation of educational purposes and eligible locations.

There are two different restrictions currently imposed and proposed to continue to be imposed on wireless Internet/email access from portable devices: (1) the device can only be used while the individual is on or in an eligible school building or library; and (2) the device must be “used” for an eligible purpose.

With respect to the eligible location requirement, the FCC already has recognized that some wireless telecommunications cell service may be eligible for E-rate discounts when used for an educational purpose that occurs beyond the four corners of an eligible school or library building. Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Second Report and Order, FCC 03-101 (Order Released April 30, 2003), ¶19, n. 28. Such examples include school bus drivers’ use of cell phones when transporting students to and from school and a school personnel’s use of a cell phone while on a field trip.

The same premise, that an individual may access the Internet and/or email using a wireless portable device for an educational purpose while not on school property, holds true and should be recognized as a reality of today’s educational and library workplaces. For example, most employees are provided with Blackberry or Treo devices in order for them to stay connected to school business when they are at remote locations. Returning e-mail or receiving calls only when you are actually in your office is no longer a reality. Frequently, administrators and other school personnel may be off campus frequently attending meetings during which time they cannot be “disconnected” from the school’s business. There is absolutely no difference between a school employee’s use of a cell phone beyond school premises and the use of the very same device to access the Internet beyond school premises.

Notably, the debate over the eligibility of wireless email access from a portable phone-like device appears to be the result of the legal classification of this service as an information service rather than a telecommunications service. When the E-rate program first began, there was no such debate over eligible uses or locations when the FCC and USAC determined that paging transmission service was eligible for E-rate discounts. (See, e.g., FCC FAQs dated July 2, 1997). Since that time, the eligibility status has evolved to require the service to be used on school premises and/or for security purposes.

Like wireless email service, paging service could be used by school personnel at both eligible and ineligible locations. Many applicants (like the work force in general) have evolved from using paging technology (which is telecommunications based) to wireless Internet access using portable devices to stay in touch with the workplace while off site. The legal classification of the service should not drive the eligibility determination for E-rate support. It appears that simply because the wireless email technology has a different legal classification (information service rather than telecommunications) the service is not eligible for E-rate discounts—whereas wireless cell phone service, when used off site for educational purposes, is eligible for E-rate. This result is incongruous with the embrace of emerging and evolving technology, which the universal service support mechanisms are supposed to recognize over time.

SECA proposes, therefore, that any applicant that can demonstrate that the wireless email access via a portable device is used for educational purposes should be able to obtain E-rate support for this service. The evidentiary demonstration should not require the E-rate administrator to confirm there is an auditable system in place to confirm that the usage is related for an eligible purpose. Such a requirement is far too tedious and cumbersome for applicants, vendors and the E-rate administrator to meet. SECA instead proposes an “all or nothing” rule: in order to be eligible for E-rate support for this service, applicants must restrict school/library personnel to using this service *only* for eligible purposes, and should be capable of demonstrating that this restriction is in place by memorializing the restriction in writing to any personnel who use wireless Internet/email access via a portable device (such as a Blackberry, Treo or cell phone with email access).

Alternatively, with respect to the “use” issue, the FCC already has addressed this issue in clarifying the definition of “educational purpose.” In its Second Report and Order, the FCC amended the E-rate governing regulations to specify that “[A]ctivities that are integral, immediate, and proximate to the education of students, or in the case of libraries, integral, immediate, and proximate to the provision of library services to library patrons, qualify as ‘educational purposes’. Activities that occur on library or school property are presumed to be integral, immediate, and proximate to the education of students or the provision of library services to library patrons.” 47 C.F.R. § 54.500(b). Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Second Report and Order, FCC 03-101 (Order Released April 30, 2003), ¶17. Consequently, if the “location” restriction is permitted to stand – which SECA does *not* recommend as its primary position – then at the very least, the “use” restriction should be omitted because the FCC’s educational purpose presumption should govern.

III. Text Messaging Should Be Eligible For E-rate Support. (Proposed ESL, pp. 4, 6, 39)

The proposed ESL contains new language that establishes that text messaging is an ineligible telecommunications service, although no explanation for this determination is provided. The only description offered is confounding: “Text Messaging and other services that are not treated as telecommunications services are not eligible in the Telecommunications Service category.”

SECA is at a loss – as will be all other stakeholders – to understand what is meant by this explanation and the phrase “not treated as telecommunications service.” Text messaging is offered as an adjunct to telecommunications cell service, and uses the same technology as cell phone service – and *is* a telecommunications service, much like paging service (which is eligible under certain conditions) transmits alphanumeric messages. It makes no sense to prohibit cell text messaging as a supported service, when the same kind of service – indeed the exact same messages -- is eligible for support under paging service.

In fact, in another section of the proposed ESL, text messaging is classified as a telecommunications service, albeit an ineligible telecommunications service. Under the universal service statute, there is no

distinction made between eligible and ineligible telecommunications services, as long as the telecommunications service are commercially available – which is certainly the case with respect to cell text messaging. Moreover, the cost of text messaging is typically incidental or nominal as an ancillary service to cell phone service. It makes little sense to classify this service as ineligible under the telecommunications category when the service is an adjunct offering to telecommunications service. Like the FCC’s approach regarding custom calling services, the text messaging service should be eligible for discounts under the telecommunications category of service.

For these reasons SECA proposes, therefore, that text messaging via cell service be eligible for support as an adjunct or ancillary service under the telecommunications category of service. To not take this position will cost the fund more money to administer than will be saved because of the time it will take PIA and invoicing staff to review every cellular phone funding request and invoice to remove these fees or ensure that they have been removed.

IV. USF Administrative Charges Should Be Eligible for E-rate Support. (Proposed ESL, p. 21)

Another new clarification in the proposed ESL, under the definition, “Miscellaneous Fees and Charges,” is that additional charges for universal service administration are not eligible for support. Although the clarification is new to the proposed ESL, USAC has adopted this position with respect to prior years’ applications. As a result, applicants have been required to painstakingly review all of the line item taxes and surcharges on their telecommunications bills and to demonstrate to USAC that no line item charge for administrative fees associated with collecting the universal service assessment have been included in the applicants’ E-rate funding requests. The administrative burden of implementing this prohibition far exceeds any potential savings to the E-rate fund, and SECA urges the FCC to omit this restriction in the ESL.

The FCC’s rules prescribe that the actual cost that a telecommunications carrier incurs for contributing to the universal service support mechanisms may be passed on to customers as a line item on the customer’s bill, provided that no additional charges are included in the line item charge. 47 C.F.R.

§54.712. Any additional administrative charge associated with the carrier's collection of universal service contributions from customers could be itemized as a separate line item provided that the charge is not described as a regulatory fee.¹ In this same Order, the FCC made clear that these administrative costs are no different than any of the other costs that carriers may incur to provide telecommunications services: *"These costs, in our view, are no different than other costs associated with the business of providing telecommunications service and may be recovered through rates or other line item charges."* *Id.* (Emphasis added).

In light of the fact that the administrative charges incurred by a telecommunications company in order to collect the universal service contribution from customers is a charge incurred by the company in the provision of telecommunications – a point that the FCC itself has explicitly acknowledged as cited above – there is absolutely no reason why these administrative fees should be treated any differently than all of the other eligible taxes, surcharges and costs of doing business for which applicants may obtain E-rate support.

In addition to this persuasive legal rationale for allowing administrative charges related to universal service contribution collection to be eligible for E-rate, the practical effect of this ruling will be to improve the efficiency of the E-rate administrator's operations by alleviating the mandate that staff resources be allocated for painstaking "needle in the haystack" kind of reviews to insure that these extremely minor administrative charges – which are pennies on bills in most cases -- have been properly identified and deducted from support calculations.

¹ See, e.g., Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review-Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, et seq., CC Docket No. 96-45 et al, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-239 (Order Released December 13, 2002), ¶54.

V. Any Service Or Equipment Not Included On The ESL Should Not Be Automatically Deemed To Be Ineligible. (Proposed ESL, pp. 6, 9, 17, 19 and 22)

With the FCC's and USAC's efforts to present the proposed ESL in a more concise manner, the new language at the end of each section which states that products and services not included in the ESL are presumed to be not eligible is extremely problematic. There is no conceivable possibility that the proposed ESL includes every single eligible product or service. Simply because a service or product was not listed in the ESL should not automatically disqualify it from E-rate support. Rather, products or services not listed on the ESL should be eligible for support IF those products or services are consistent with the determinations and principles expressed in the ESL or by the Commission. Moreover, any presumption of ineligibility should be rebuttable by applicants. We strongly recommend that this new "presumption of ineligibility" language be removed, or at the very least be amended consistent with these suggested qualifications.

VI. Voice Over the Internet (Proposed ESL, p. 5) Should Not Preclude An Otherwise Eligible Telecommunications Service From Being Funded.

Although the legal classification of Voice Over the Internet continues to be under review by the FCC, we can see no reason why the service should continue to be classified as ineligible for E-rate support IF the service is provided over leased facilities which are otherwise eligible for support. For example, if a telecommunications carrier provides leased transmission circuits to an applicant and those circuits are capable of being used for Voice over the Internet, the leased transmission circuits should continue to be eligible for E-rate notwithstanding the fact that those circuits may have VOIP capability. The proposed ESL suggests that all VOIP services are ineligible, notwithstanding the fact that some telecommunications companies' services which are otherwise eligible for support are capable of providing VOIP. We request that the FCC make this clarification so as to remove any potential ambiguity.

VII. The ESL's Cost Allocation Language Is Inconsistent with the Bishop Perry Order and Existing FCC Rules. (Proposed ESL, p. 23).

Under the Additional Reference Information, the description of Cost Allocation states that, "Support is not provided for funding requests that require cost allocation if no cost allocation is provided." This language is extremely problematic because it is incorrect and would establish a new substantive rule that conflicts with existing FCC regulations.

The quoted language indicates that applicants who inadvertently include a service or product in a funding request with mixed eligible and ineligible functions, and who fail to deduct the cost of the ineligible uses/components are at risk for having their entire funding request, which may contain far more than one component or service, denied.

Yet, under the FCC's 30% ineligibility rule, applicants may receive partial funding of a funding request as long as less than 30% of the funding request contains ineligible services/components. The cost allocation language in the proposed ESL is completely at odds with the 30% rule, and also conflicts with the intention of the Bishop Perry Order to allow applicants to make corrections to their Form 471 applications for inadvertent mistakes. Indeed, a close review of the document cited in the Cost Allocation section of the proposed ESL, "Cost Allocation Guidelines for Products and Services," reveals that the document does not contain the language set forth in the proposed ESL. Rather, the document correctly states that a failure to cost allocate ineligible products and services may put an applicant at risk for denial in light of the 30% rule.

For these reasons, SECA feels strongly that the quoted sentence above ("Support is not provided for funding requests that require cost allocation if no cost allocation is provided.") must be omitted from the final ESL. If this sentence is included in the final ESL, we believe it will undo the existing FCC-approved 30% rule as well as undermine the explicit intention of the Bishop Perry Order which is to avoid denials wherever possible.

VIII. The Cost-Effective Standard Appearing In The Proposed ESL Must Be Construed In Accordance With the Requirements of Selecting The Most Cost-Effective Proposal for Services. (Proposed ESL, Passim)

The proposed ESL contains numerous references to the fact that a service or product must be cost-effective in order to be approved for E-rate support. SECA agrees and understands that one of the tenets of this program is that an applicant must select the most cost-effective proposal as a result of conducting a competitive procurement by posting a Form 470 and receiving proposals for a minimum of 28 days. SECA is concerned, however, that the language in the ESL may be construed by USAC to mean that even if the most cost-effective proposal is selected, USAC somehow could be free to deny E-rate support on the basis that USAC found that not even the most cost-effective proposal received by an applicant was in fact economically cost-effective. If in fact, this result is a possible outcome of the new language in the ESL, SECA strongly opposes this change because such an outcome does not allow for unique conditions and circumstances that an applicant may be facing to be taken into account. Further, if this analytical approach for evaluating funding requests is going to be implemented, then USAC must publicize the standards of cost-effectiveness that will be used, so that applicants can receive proper advance notice of these guidelines and take them into account when posting Form 470s and evaluating proposals received in response thereto.

IX. Conclusion

SECA respectfully requests the FCC to make the above-described revisions to the Eligible Services List for Funding Year 2007.

Sincerely,

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