



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

_____)	
In the Matter of)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	
_____)	

PETITION FOR THE CLARIFICATION AND/OR WAIVER OF E-RATE RULES CONCERNING TECHNOLOGY PLAN CREATION AND APPROVAL UNDER THE SCHOOLS AND LIBRARIES UNIVERSAL SERVICE SUPPORT MECHANISM

Over the past year or so, at least 75 applicants have had their FY 2005 or FY 2006 applications (involving over 440 FRNs) denied by USAC for not having written technology plans at the time they filed their Form 470 or Form 471 applications. Typically, the stated reasons for these denials are expressed in the applicants' Funding Commitment Decision Letters as one of the following:

A technology plan covering the current funding year was not in place at the time of the filing of the Forms 470 and 471. Technology plans are required when applicants apply for more than basic wireless and wireline telephone services.

Documentation indicates that you did not have a written Technology Plan at the time the Form 470 was filed. FCC rules require applicants to have a written tech plan, at the time the Form 470 is filed, if they are seeking discounts for more than basic phone service.

No technology plan covering the current funding year was in place when the Form 470 was filed. A written technology plan is needed if seeking discounts for more than basic phone service.

Additionally, an unknown number of Form 486s have been rejected — effectively denying funding on a post-commitment basis — for similar reasons (see further discussion below).

The State E-Rate Coordinators' Alliance (“SECA”)¹ believes that many of these denials are the result of an unnecessarily strict interpretation of the FCC’s technology planning requirements. SECA submits this petition to seek clarification and/or waiver of these requirements and to suggest an alternative interpretation that it believes will meet the technology planning objectives of the program, be fairer to applicants, be easier for USAC to administer, and be more closely aligned with the technology plan approval activities of the states and their applicants. Specifically, SECA argues that, as a general rule, applicants with currently approved technology plan should be deemed compliant with the FCC’s existing pre-Form 470 technology plan requirements.

Background

Since its inception, a key tenet of the E-rate program has been that an applicant request for discounts on products and services (other than “basic” telephone services) be based on a technology plan. To this end, E-rate rules require that every applicant have a technology plan that encompasses five core components and that the plan be approved by a USAC-certified technology plan approver.

¹ The SECA organization is comprised of individuals providing 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). Furthermore, 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.

For several years, prior to the release of the FCC's Fifth Report and Order (FCC 04-190) on August 13, 2004, there had been some confusion regarding the required timing of the development and approval of a technology plan. Regarding the approval date, early FCC rules specified that a plan must be approved before the filing of a Form 470 for a given funding year. Consistent with certifications in FCC Form 470 and FCC Form 471, however, USAC procedures required only that a plan be approved by the start of services — normally July 1 of the funding year.

In its Fifth Report and Order, the FCC resolved any remaining uncertainty concerning the required approval date by stating:

56. *Technology Plan Timing.* We revise section 54.504(b)(2)(vii) so that applicants with technology plans that have not yet been approved when they file FCC Form 470 must certify that they understand their technology plans must be approved prior to the commencement of service. In making this change, we recognize that the timing of technology plan approval in particular states and localities may not coincide perfectly with the application cycle of the schools and libraries support mechanism. At the same time, we emphasize that applicants still are expected to develop a technology plan prior to requesting bids on services in FCC Form 470; all that we are deferring is the timing of the approval of such plan by the state or other approved certifying body. Second, we amend our rules to require that applicants formally certify, in FCC Form 486, that the technology plans on which they based their purchases were approved before they began to receive service. This revision conforms our rules to the current instructions for filing FCC Form 470 and is consistent with the views of commenters. The revision permits applicants to meet our technology plan requirements as long as their technology plans will be approved before they begin receiving service. It also ensures that applicants formally confirm that their technology plans were approved when service begins.

Formal resolution of the plan approval date requirement was both a welcome and practical development. Over the course of the E-rate program's development, state departments of education (and other school and library organizations) had largely institutionalized the technology plan approval process geared to a July 1 approval deadline — typically requiring the submission of plans for review in the early spring. Had the FCC insisted upon plan approval prior to the filing of a Form 470, state approval procedures and schedules would have all had to be recast.

Although the FCC's Fifth Order resolved the requirements for technology plan approval, it did little more than reiterate the expectation that an applicant "...develop a technology plan prior to requesting bids on services in FCC Form 470." The Order, however, did not specify any

requirement as to the level of plan development at that stage in the funding cycle, nor did it establish any requirement that an applicant document the date on which a plan was “developed.”

The importance in clarifying the pre-Form 470 technology plan requirement has become increasingly evident as demonstrated by USAC’s new Form 486 reviews. While USAC does not publicly reveal many of its procedures, it appears that USAC is randomly selecting certain Form 486s for technology plan review. An applicant, so selected, is being asked to provide:

1. Confirmation that the applicant has an approved technology plan consistent with the products/services requested and for the period of service for which discounts are sought.
2. A copy of the technology plan approval letter issued by an SLD-certified technology plan approver.
3. A written statement specifying the “creation date” (month/year) of the associated technology plan(s) — which presumably must be on or before the date on which the applicant’s Form 470 was posted.²

Any applicant who “fails” a tech plan review receives a Form 486 Rejection Letter, effectively putting the applicant’s funding in limbo. The applicant will have already received a positive funding commitment decision but, unless and until the applicant’s Form 486 is accepted, USAC will not process invoices for the associated FRNs. As a practical matter, therefore, an uncorrectable Form 486 rejection is equivalent to a denial.

Discussion

As a matter of policy and procedure, SECA takes no issue with a requirement that an applicant be able to confirm and/or document that it has an approved plan. As discussed above, the existence of an approved technology plan by the start of service is a longstanding requirement of the program, and the requirement to retain a copy of that plan and the associated approval letter is clearly stated in the FCC’s Fifth Order.

² It should be noted that the term “creation date” does not appear in any FCC regulations covering technology plans or in the technology plan information on the SLD website. A technology plan is a living, evolving document. Except when first completed, there is no follow-up “creation date.” Thus the term “creation date” is confusing and misleading. The FCC should direct USAC to use the term “updated draft date.”

The issue of proving and documenting that a technology plan had been developed prior to the filing of a Form 470, however, is much more problematic. SECA has the following concerns:

1. FCC rules do not specify — and USAC has provided little guidance regarding — the degree to which a non-approved technology plan must be “developed” prior to filing a Form 470.³
2. Until USAC began asking selected applicants for the creation date of their plans, there had been no indication that any applicant should make note of that date, much less that they might be required to produce an unapproved copy of the plan as of that date.⁴
3. As being administered by USAC, Form 486 tech plan reviews are particularly troublesome for any consortium leader who, if not operating under consortium-wide technology plans, is being asked to provide evidence that all its members had developed technology plans before the consortium filed their Form 470s. For the consortium, which is already collecting LOAs and Form 479s and is tracking technology plan approvals for its members, this is an unacceptable additional burden.⁵
4. The pre-Form 470 technology plan requirement is being applied to a relatively small percentage of applicants subject to Selective Reviews, audits, or Form 486 reviews. As a practical matter, SECA suspects that most applicants, not operating under multi-year technology plan approvals, would have a difficult time meeting USAC’s strict interpretation of pre-Form 470 plan development 9-10 months prior to the start of a funding year. Resulting Form 471 denials and Form 486 rejections, therefore, appear arbitrary and capricious.

³ USAC guidelines do stress that the pre-Form 470 technology plan must explicitly cover the entire forthcoming funding year, but such guidance is not currently reflected in any FCC Order.

⁴ We note that Para. 48 of the FCC’s Fifth Report and Order indicates under the “Pre-bidding Process” bullet that “[b]eneficiaries must retain the technology plan and technology plan approval letter,” but this language appears to refer to the approved technology plan associated with the approval letter, rather than to any developmental plan.

⁵ We are aware, for example, of at least one large consortium application with over 800 schools and libraries that has been in a Form 486 tech plan review status for over six months, delaying payment of over \$4 million. The consortium lead staff has spent 40-60 hours confirming hundreds of consortium member technology plan draft dates, “creation” dates, approval dates, etc., to address constantly changing requests from the Form 486 reviewer.

SECA asks, therefore, that the Commission review and clarify its rules with regard to the level of technology planning required before an applicant — whether it be a single school or library, a consortium, or even a state — posts a Form 470.

As an alternative to USAC's apparent interpretation, as reflected in its current review, denial, and rejection procedures, SECA suggests the following technology planning guidelines that it believes would better meet the spirit, intent, and letter of the FCC rules:

1. As a general rule, any school or library applicant operating under an approved technology plan at the time it files a Form 470 would be deemed to be compliant with the FCC's pre-bidding planning rules for the forthcoming funding year.⁶

Such a general rule would recognize, as a practical matter, that most changes in technology strategy are evolutionary rather than revolutionary. This is particularly true with regard to many E-rate eligible services that are ongoing in nature such as telecommunications, Internet access, and equipment maintenance services.

Acceptance of currently approved plans as a pre-Form 470 filing condition would permit most applicants to undertake more thorough and timely revisions to expiring plans the following spring, more in line with the plan review schedules of many state agencies. It would also eliminate incentive to produce virtually useless pro forma updates the preceding fall, at time when their current year applications may have not yet been approved, solely for E-rate compliance purposes.

Applicants would still be required to have an approved plan by the start of service.

2. As exceptions to the general applicant rule:
 - a. Any applicant planning to introduce a new technology initiative not covered in its existing plan would, upon request, be responsible for demonstrating that it was following the evaluation component of its current plan. Failure to so demonstrate, documented by a plan addendum, would jeopardize funding related only to the new initiative, not to ongoing needs.

⁶ Specifically, an applicant's compliance would be assured even if its plan's approval is set to expire 9-10 months hence at the end of the current year.

- b. Any applicant without a currently approved technology plan (e.g., a new E-rate applicant), would be responsible for preparing at least a draft technology plan addressing all five core components and covering the upcoming funding year prior to filing its first Form 470.
3. Statewide and/or consortium applicants should not be subject to pre-Form 470 technology plan requirements. In particular:

- a. A state contracting entity, filing a Form 470 in connection with state master contracts that may be used by E-rate applicants for a variety of eligible products and services, should not itself be subject to any technology plan requirements.

Most specifically, we believe that it is both unnecessary and impractical to require state agencies to track the technology plan status of all possible applicants who might or might not use the resulting state contracts. Furthermore, we see no real need or value in requiring a technology plan from state contracting agencies themselves, especially since most are not E-rate eligible and are not filing their own Form 471s.

Any applicant using a state master contract, however, would be required to have an approved (or draft) technology plan in place at the time it filed its Form 471. Such a plan should cover the services reference in the state master contract.

- b. A consortium, not operating under its own consortium-wide technology plan, should be permitted to rely upon the technology plan status of each of its members when the consortium files a Form 470. As such, USAC procedures should be limited to a review of consortium member Letters of Agencies ("LOAs") if such LOAs contain appropriate certifications on technology plan status consistent with the suggested guidelines provided above.

Besides being fairer to the applicants and streamlining USAC's administrative procedures, one other major advantage of this approach would be to clearly align it with most states' existing technology plan procedures and review schedules. Given the importance of these organizations to the efficient and effective administration of the technology planning aspects of the E-rate program, such coordination is critical.

Regardless of whether the FCC clarifies its pre-Form 470 technology plan requirements along the lines suggested above, SECA asks that it waive any stricter interpretations with respect to applicants operating under approved technology plans whose related FY 2005 and FY 2006 Form 471 applications had been denied or Form 486s had been rejected or are currently under review. Whether or not those decisions have been appealed, we urge the Commission to instruct USAC to review and reverse all denials and rejections traceable to applicant confusion on pre-Form 470 technology planning and documentation requirements.⁷

Respectfully submitted:

/s/ Gary Rawson

Gary Rawson
Chairman
State E-Rate Coordinators' Alliance
Mississippi Department for ITS
301 N Lamar Street, Suite 508
Jackson, MS 39201
(601) 359-2613
Gary.Rawson@its.state.ms.us

February 21, 2007

⁷ Because the number of Form 471 denials is limited and well-defined by the denial status memo language, and the Form 486 rejections are presumably well-documented in a USAC database, the administrative burden of such a review should not be overly burdensome.