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

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

COMMENTS ON THE ADMINISTRATIVE PROCEDURES OF THE UNIVERSAL SERVICE ADMINISTRATIVE COMPANY SCHOOLS AND LIBRARIES PROGRAM

On October 31, 2007, as required by the FCC's Fifth Report and Order (FCC 04-190), the Universal Service Administrative Company ("USAC") submitted a list to the Commission summarizing all current USAC administrative procedures under the Schools and Libraries Universal Service Support Mechanism.

The State E-Rate Coordinators' Alliance ("SECA"), having reviewed this summary, submits the following comments on these administrative procedures.

Comments on E-Rate Procedures:

Page 5: "Standard of review for appeals by the Administrator"

Further Detail:

"USAC grants appeals consistent with the following guidelines, assuming no other issues are identified during the appeal review process that would require a denial."

Specifically:

"When the applicant provides USAC with information and/or documentation the applicant did not provide when the original request was made. In general, a PIA reviewer will contact the applicant and ask for all information necessary to make decisions about an application. If that contact does not occur or the applicant is unable to respond to the request, and funding is denied, USAC may grant an appeal when the appellant provides such original documentation. For example, during PIA review, the applicant indicated that it did not have a signed contract and USAC denied funding because there was no signed contract. On appeal, the applicant claims that the requested services are services provided under tariff and not covered by a contract. USAC will generally accept this new information on appeal.

"However, USAC will NOT grant this appeal if the documentation provided on appeal contradicts information contained in the original file and the applicant is unable to resolve the discrepancy. For example, if the applicant had provided an unsigned copy of a contract during the review of its application, USAC will generally not accept the applicant's claim on appeal that it is a non-contractual tariffed service since it contradicts the documentation previously provided."

Comments:

Due to the complex nature of E-rate rules and procedures, applicants may provide incomplete or inaccurate data to the SLD during PIA processing. In the spirit of Bishop Perry, and in the absence of indications of fraud, SECA believes that the SLD should accept any new information during the appeal process that would cure original mistakes.

Specifically, as it applies to USAC's own example, USAC should accept the new information related to the applicant's service being provided on a tariffed or month-to-month basis. It is not uncommon for a novice E-rate contact to receive a PIA request for a contract and, in trying to comply with this request, provides the reviewer with a draft, unsigned, or outdated contract or termination agreement. After the FRN is denied, the contact later realizes that the service is not being provided under contract, but on a month-to-month basis. This is a legitimate misunderstanding; SECA believes that such a correction should be accepted.

With regard to this specific example, SECA notes that there is considerable confusion with regard the definition of "contract." In selecting services on a

tariffed or month-to-month basis, applicants are often provided with a range of monthly rates based on their selection of different term agreements. In SECA's view, the selection of a specific term, whether memorialized in signed document or not, should not require an applicant to file a funding request as a contract. Treating all term agreements as "contracts" for E-rate purposes needlessly complicates the application process. On a "contract" basis, for example, an applicant with five T-1s, each installed at different times and with non-coterminous terms, would be required to file five separate funding requests, even if all five circuits are included in a single monthly bill.[1]

Page 10: "*De Minimis* Standard"

Further Detail:

USAC does not seek recovery of funds when the cost of seeking repayment is greater than the aggregated repayment amount.

Comments:

SECA agrees fully with this procedure in principle, but not in practice. It appears that USAC has set an unreasonably low level for *"de minimis."* Although the procedures do not detail a specific *de minimis* level, we note a recent FCC appeal by Los Angeles Unified School District[2] of a USAC Demand Notice that read:

> "As a result of your appeal it has been determined that only the Additional Battery Pack was not delivered and therefore, USAC will seek recovery of $329.21 of improperly disbursed funds from both the applicant and the service provider."

SECA believes that the cost of this recovery, which had already involved a USAC appeal, and has now led to an FCC appeal, has already far exceeded the $330 in question.

In early 2005, in response to an FCC request for comments (DA 04-3851) on USAC Proposed Audit Resolution Plan, SECA asked the FCC to clarify the *De Minimis* Standard governing USAC actions for the recovery of improperly disbursed funds, and proposed a threshold no lower than $2,500.[3] We hereby reiterate that request and recommendation.

Page 12: "FCC Form 486 Service Start Date Programmatic Changes"

[1] Further complicating the process for applicants is that the term agreements for the circuits would likely expire at various times during various funding years, resulting in partial year funding if filed for as contracts.

[2] See http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519809050.

[3] See http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516886858.

Further Detail:

"If the FCC Form 486 postmark date is 120 or more days after the Funding Commitment Decision Letter (FCDL) date or 120 or more days after the Service Start Date on the form, adjust the Service Start Date to the postmark date less 120 days. Reduce the recurring commitment amount accordingly. This does not affect the non-recurring commitment amount."

Comment:

As written, this procedure does not appear to reflect the intent of the FCC's *Alaska Gateway* decision (DA 06-1871) that requires USAC to reach out to applicants who have not filed their required Form 486s by the 120-day deadline and to give them an additional 15 days (20 days from the notification letter date) to file their Form 486s without penalty.

Page 19: "Equipment generally must be delivered within the funding year with some exceptions."

Further Detail:

"The exceptions for delivery of service within the funding year are:

> "Delivery of service must be within the allowable number of days of contract expiration date;
>
> "Certain components of Priority 1 services may be pre-installed prior to the funding year and then reimbursed during the funding year;
>
> "Certain mobilization services will be reimbursed prior to service delivery if contractual recovery mechanisms are in place at the time of the FCC Form 471 filing."

Comment:

The requirement to deliver equipment within the funding year does not reflect the automatic extension (nor the possibilities for additional extensions) provided for the delivery of non-recurring services.

Page 25: "Invoice Deadline Extension"

Further Detail:

"USAC grants requests for extensions of time in which to invoice USAC under the circumstances listed below:

- "Authorized service provider changes;
- "Authorized service substitutions;
- "USAC did not provide timely notice to the applicant and/or service provider. For example, the service provider's FCC Form 486 Notification Letter is returned to SLD/USAC as undeliverable;
- "USAC made an error that resulted in the invoice being received into its data systems late. For example, USAC made an error in the data entry of an invoice;
- "USAC delays in data entering the form resulted in the invoice being late;
- "Documentation requirements necessitated third party contact or certification;
- "Natural or man-made disasters prevented timely filing of invoices;
- "Need for Good Samaritan Billed Entity Applicant Reimbursement (BEAR) form; and
- "Circumstances beyond the service provider's control."

Comment:

The list of reasons that USAC must grant extensions also should include:

- Applicant or service provider receiving notice of a $0.00-funded BEAR.
- Circumstances beyond the applicant's control.

Page 33: "Amortization of Upfront Costs for Service Provider Infrastructure"

Further Detail:

"USAC funds a certain amount of upfront costs associated with service provider infrastructure on an amortized basis. USAC applies a $500,000.00 threshold to apply this requirement based on informal guidance from Commission staff."

Comment:

This is a poorly written summary of the rules and guidance dealing with telecommunications installation charges based on the FCC's *Brooklyn Library* decision (FCC 00-354). It confuses installation charges with upfront service provider infrastructure costs. It also seems to imply a $500,000 total funding threshold, rather than a funding threshold above which all non-recurring charges must be amortized over at least three years.

Page 36: "Consortium Reviews – Deficient Letter of Agency"

Further Detail:

"The consortium Letter of Agency must contain required elements that indicate the timeframe the Letter of Agency is valid, the type of services requested, who is acting on behalf of the consortium and the consortium member's authorization. These elements are required to demonstrate the authority and the timeframe the consortium member has granted the consortium leader."

Comment:

Consortium review procedures should take into account the fact that another document that shows "knowingness" of the consortium member may be substituted in lieu of an actual LOA. As such, PIA review procedures should be amended to require the PIA reviewer to reach out to the consortium to request such alternative documentation should the original LOAs be deemed deficient in order to avoid funding reductions or denials.

Page 38: "Cost-Effectiveness Review"

Further Detail:

"USAC reviews Funding Request Numbers (FRNs) to determine whether the applicant is in compliance with all applicable Commission rules and policy guidance with respect to cost-effective funding requests."

Comments:

As implemented, USAC's cost-effectiveness procedures appear to go well beyond FCC rules and policy guidance. As of the FCC's *Third Report and Order and Second Further Notice of Proposed Rulemaking* (FCC 03-323), the Commission simply sought comment on whether is should codify additional rules on cost-effectiveness, and explicitly stated: "Nor do our rules expressly establish a bright line test for what is a 'cost effective' service."

Without public comment or discussion, USAC has apparently developed its own "bright line" tests both for products and services that appear to be entirely insensitive to local conditions (particularly for maintenance costs). Additionally, USAC appears to be basing certain denials on per student cost ratios which it deems too high, regardless of the actual costs of providing service.[4]
If USAC is to continue these cost-effectiveness reviews, SECA suggests that the Commission direct USAC to provide more details on its cost-effectiveness procedures or, at a minimum, require USAC to describe the types and basis of these reviews.

[4] As one example, see the FCC appeal filed by White Plains Public School District on February 9, 2007, available at: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518725760.

Page 44: "Eligibility of Incidental Costs"

Further Detail:

"USAC denies requests for incidental costs unless they include only eligible products and /or services that are reasonable for the scope of the project. Examples of incidental costs are contingencies fees, restore to pre-installation conditions, training and design and engineering."

Comments:

As discussed in its earlier comments on the Eligible Services List for FY 2008, SECA continues to believe that USAC's definition of eligible training costs is much narrower than the standard set forth in the FCC's *Henkels & McCoy* decision (DA 06-1463) that would include end-user training as long as it is not geared towards use "…in teachers' programs of instruction or for professional development."

We also note that use of the word "incidental," referring to ineligible costs, may be confused with the word "ancillary," referring to small (and otherwise incidental) costs that may be included with eligible funding requests.

Page 50: "Letter of Agency or Consultant Agreement"

Further Detail:

"The Letter of Agency (LOA) or Consultant Agreement authorizes the consultant to act on the behalf of the applicant. The LOA or Consultant Agreement must be for the current funding year, which was signed, and effective, prior to the filing of the FCC Form 470 or prior to when consulting services begin."

Comments:

SECA is particularly concerned with the USAC procedure requiring consultants to have signed LOAs or agreements prior to providing any services to applicants, in part because many state E-rate coordinators provide a wide range of consultative services to their states' applicants. More broadly, however, SECA believes that USAC's consultant procedures are unsupported by any FCC rule.

As indicated in the FCC's *Third Report and Order and Second Further Notice of Proposed Rulemaking* (FCC 03-323), the Commission simply sought comment on "whether applicants should be required to identify any consultant or other outside experts, whether paid or unpaid, that aid in the preparation of the applicant's technology plan or in the applicant's procurement process." If there is no rule requiring even consultant identification, how can an LOA be required?

We suspect that the USAC procedure is based on a misinterpretation of the record retention requirements of the *Fifth Report and Order* (FCC 04-190) that included as an example of documents that must be retained: "signed copies of all written agreements with E-rate consultants." Our interpretation is that this language means that such documents should be retained if they exist, not that they must exist.

Based on current FCC rules and other USAC procedures, SECA believes that consultants should be held to the same LOA requirements as consortium leaders — if, and only if, they are signing forms on behalf of applicants. In such cases, USAC should seek evidence that LOAs have been signed prior to the filing of applicant Form 471s (as required for consortia).

Page 52: "Mixed Bucket Review"

Further Detail:

Funding Request Numbers (FRNs) cannot include service from more than one service category. The service categories specified on the FCC Form 470 and FCC Form 471 are: Telecommunications Services, Internet Access, Internal Connections, and beginning with Funding Year 2005, Basic Maintenance of Internal Connections.

Telecommunications services and Internet access are Priority 1 services. Internal connections and, beginning in Funding Year 2005 Basic Maintenance of Internal Connections, are Priority 2 services.

If an FRN contains both Priority 1 and Priority 2 services, the FRN is split into two distinct FRNs. One FRN will be for Priority 1 services and the other FRN will be for Priority 2 services.

Comments:

The prohibition against mixed bucket FRNs fails to exclude the one exception allowed for including Internet Access in Telecommunications FRNs for administrative convenience (as per the Eligible Services List).

The FRN split language is not fully accurate or complete. The split should not be between the two priorities, but rather (with the exception of the Telecommunications/Internet exclusion) between the four categories of service.

Page 63: "Service Provider or Consultant Authorized to Sign the FCC Form 471"

Further Detail:

"USAC reviews the FCC Form 471 to determine whether the service provider or consultant has prepared the FCC Form 471 and is authorized to complete and sign the form. This review ensures that the applicant is aware that services have been requested on their behalf by the service provider or consultant."

Comments:

As indicated in the consultant LOA discussion above, SECA agrees that USAC should determine whether a consultant has been authorized to sign an applicant's Form 471.

SECA questions, however, whether there are any circumstances under which a service provider should be authorized to sign an applicant's Form 471. Most specifically, it is not clear that a service provider would ever be in a position to complete the certifications required by a Form 471 authorized signer.

Page 66: "State Master Contract Procedure"

"USAC accepts State Master Contracts signed by an entity other than the billed entity that submits the application containing the Funding Request Number that relies on that State Master Contract."

Further Detail:

"State Master Contracts are contracts which are competitively bid and put in place by an entity of state government for use by others. If a billed entity relies on a State Master Contract to submit its FCC Form 471 application, the billed entity will not have signed the State Master Contract."

Comment:

This procedure defines State Master Contracts only as those state contracts awarded by competitive bid. This is too narrow a definition. It confuses two separate questions, namely:

1. What is the required E-rate procurement process?
2. What is an eligible E-rate contract?

SECA believes the following:

1. If a state has filed a Form 470, resulting in a competitively bid contract, an applicant can simply rely upon (and cite) that Form 470 and utilize that contract for E-rate purposes.
2. If a state filed a Form 470, resulting in a multi-vendor award contract, an applicant can rely on that contract, but must be able to document its selection of a specific contract vendor in line with state procurement rules.

3. If an applicant files its own Form 470, and opts to obtain service under a state contract and rely upon that contract, it must also be able document its selection of a specific contract vendor in line with state procurement rules.

Page 75: "Verify that applicant posted an FCC Form 470 seeking the category of service for which it seeks discounts on the FCC Form 471."

Further Detail:

"USAC verifies the service categories for which discounts are sought for each Funding Request Number (FRN) to ensure that on the FCC Form 470 associated with that FRN, the applicant indicated that it was seeking that type of service. The service categories specified on the FCC Form 470 and FCC Form 471 are: Telecommunications Services, Internet Access, Internal Connections, and beginning with Funding Year 2005, Basic Maintenance of Internal Connections.

"If the applicant did not indicate that it was seeking the category of service on the associated FCC Form 470 for which it seeks discounts on the FCC Form 471, USAC denies the FRN."

Comments:

Category of service can be confusing to applicants and, under this procedure, often becomes the basis for funding denials. Usually, the confusion is within Priority 1 or Priority 2 services, for example:

a. Internet services often include underlying telecom circuits, and carriers often bundle Internet and telecom services. BlackBerry-type services are eligible as wireless Internet, but are typically provided as a part of general cellular telephone services. In the latter example, USAC guidance has been less than forthright, "recommending" to applicants that such mobile data services be listed in both Priority 1 categories.

b. USAC is now requiring certain warranty services (e.g., SmartNet), often included initially with equipment purchases, to be broken out as Basic Maintenance services.

SECA believes that it should be sufficient that all services are listed within the correct set of priority classes in an applicant's Form 470. Although it is important that service providers reviewing applicant requirements in Form 470s know where to look, SECA does not believe that it would place an unreasonable burden on service providers to search for services within either the Telecommunications or Internet Access categories of Priority 1, or within both the equipment and maintenance categories of Priority 2. This minor change would greatly reduce the number of denials due to inadvertent ministerial Form 470 mistakes.

Conclusion:

As noted above, a number of USAC-described procedures do not appear to reflect current practices and/or to be based on current FCC rules and regulations. SECA encourages the Commission to carefully review the current procedures submitted by USAC, as well as the proposed procedures for the FY 2008 application review process that USAC will be submitting in the near future. Given the discrepancies found, the Commission may wish to periodically subject USAC administrative procedures to public comment.

Respectfully submitted:

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