



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

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

**INITIAL COMMENTS OF THE
STATE E-RATE COORDINATORS ALLIANCE
IN RESPONSE TO THE NOTICE OF PROPOSED RULEMAKING
REGARDING ELIGIBLE SERVICES**

I. INTRODUCTION

The State E-Rate Coordinators Alliance (“SECA”) submits these Initial Comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking (“NPRM”) released on July 31, 2008 (FCC 08-173) in which the Commission sought comment on whether various new services should be deemed eligible for funding under the Universal Service Support Mechanism for Schools and Libraries (commonly referred to as “E-rate”).¹ We commend the FCC for convening this proceeding to examine eligibility issues and for providing an opportunity for all interested stakeholders to submit comments. Given the speed with which technology changes, we think it would be wise for the FCC to invite comments on eligible services every few years. A NPRM would ensure that all interested parties -- applicants and service providers alike -- have an equal opportunity to

¹ Notice of the NPRM was published in the Federal Register at 73 Federal Register 48452 on August 19, 2008.

participate and submit comments on these important issues. It is especially important, before services are newly declared to be eligible, to solicit the views of those stakeholders that do not have a commercial interest in deeming certain services or products to be eligible for E-rate.

II. BACKGROUND ABOUT SECA

Our group membership includes state E-rate coordinators who work in 40 states and/or United States territories. We work together and support each other to help applicants in our states to succeed in the program and to suggest ways to help the E-rate program better achieve its goals. 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 addition to the formal training hours, SECA members spend thousands of hours offering daily E-rate assistance to individual applicants through calls and e-mails.

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 for schools and libraries across the nation.

In addition to their 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.

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

III. ANALYTICAL FRAMEWORK FOR EVALUATING WHETHER ADDITIONAL SERVICES SHOULD BE DEEMED TO BE E-RATE ELIGIBLE

As State E-rate Coordinators, we serve dual roles of advocates for stakeholders and stewards of the program. The FCC well knows that SECA advocates policy positions, submits detailed recommendations for improving the program, and individually as states we seek maximum funding for our applicants. At the same time, we also feel that we need to be stewards of the program and must make responsible recommendations that are in the long term best interest of E-rate, to insure its continued availability and success. We have tried to strike a delicate balance between advocate and steward in preparing these Initial Comments.

It is tempting at first blush to support the addition of new services to the list of E-rate eligible products and services. A facile analysis might begin and end with the conclusion that applicants would benefit by being able to obtain additional E-rate funding by expanding the Eligible Services List, particularly since many of the services are already being purchased by schools. SECA believes that perhaps in the short term such a position may benefit applicants but as advocates of the program and stewards of the Fund, we must be concerned with the longer term implications of supporting such policies and whether the proposed additional services meet the intention of the program's goals and intent.

E-rate funded services should be integral to directly serving students and library patrons. The focus here should be on technology services and products that reach classrooms and libraries. This approach is the cornerstone of the program since its inception. Section 254(h)(2)

and the Commission's May 7, 1997 First Report and Order in CC Docket No. 96-45 makes clear that the purpose of E-rate is to provide telecommunications and advanced services to classrooms and libraries.

Our analysis is mindful of the fact that E-rate funding is a finite resource. Annual demand already well exceeds the amount of available funds. By adding more services to the Priority 1 category, the year will soon come when demand for Priority 1 services will exceed the entire funding cap. And by adding more services and equipment to the Priority 2 category, we are further exacerbating the existing problem of not being able to provide needed resources to applicants at and below the 80% discount level.²

Should services be added to the Eligible Services List, SECA suggests that other adjustments must be made to offset the additions. Such adjustments could include increasing the \$2.25 billion cap, changing the eligibility status of other currently eligible services, or adjusting downward the discount matrix for Priority 2 services and products so that the available funds can be allocated among additional deserving applicants.³

² SECA submitted an *ex parte* filing in this docket on September 11, 2008 setting forth various recommendations regarding the Comprehensive Reform proceeding (Lead Docket No. WC 05-195). Attachment 3 to that filing contains an extensive analysis of the demand for Priority 2 funding and how various factors have put upward pressure on Priority 1 funding demand, which has resulted in less Priority 2 funds being available for commitments.

³ With respect to adjusting the discount matrix for Priority 2 funding in order to make funds available to more applicants, SECA's September 11, 2008 *ex parte* filing in this docket contains a comprehensive analysis and recommendation. See Attachment 3 to that filing.

We recognize that increasing the funding cap is a major decision and not likely to occur without first conducting an in-depth examination, so it is not a short term solution. On the other hand, there may be some services and products that should be "de-classified" as eligible in order to make room for other services and products to be classified as eligible. The entire area of maintenance of internal connections deserves further scrutiny and potential restriction beyond the FCC's pronouncement in the Third Report and Order in CC Docket No. 02-6 (FCC 03-323) released December 23, 2003 at ¶¶ 21-23. Maintenance costs have steadily risen as illustrated in the annual demand forecasts that USAC submits to the FCC.

IV. BECAUSE APPLICANTS ARE REQUIRED TO HAVE FILTERING SERVICE AS A CONDITION OF RECEIVING E-RATE FUNDING FOR INTERNET ACCESS SERVICE, THIS SERVICE SHOULD BE ELIGIBLE FOR E-RATE.

An ongoing complaint that applicants voice is that they are legally required to install filtering and to incur this cost as a condition of receiving E-rate funding for Internet access service, but there generally is no E-rate funding available for filtering.⁴

It is a matter of fundamental fairness that if applicants must procure a specific product or service as a condition of receiving E-rate – such as filtering – the service also should be eligible for E-rate. Although we recognize that the inclusion of this service as eligible will put upward pressure on E-rate funding demand, this concern is outweighed by the fact that filtering is mandated by statute as a condition of receiving E-rate.

SECA agrees with the FCC’s tentative analysis that there is no legal prohibition against using E-rate funds to help applicants pay for filtering service. NPRM at ¶15. The FCC erred in its 2001 CIPA Order⁵ when the agency stated that the statutory language clearly prohibited the use of any funds other than from the Elementary and Secondary Act of 1965 or the Library Services and Technology Act to help schools and libraries pay for filtering software.⁶

The precise language of the statute, Section 1721(g) states:

(g) AVAILABILITY OF CERTAIN FUNDS FOR ACQUISITION OF TECHNOLOGY PROTECTION MEASURES.

(1) IN GENERAL.--Notwithstanding any other provision of law, funds available under section 3134 or part A of title VI of the Elementary and Secondary Education Act of 1965, or under section 231 of the Library Services and Technology Act, may be used for the purchase or acquisition of technology

⁴Currently filtering service may be eligible for E-rate only if it is offered as an ancillary service to Internet access service and both services are bundled in one price, provided by the same service provider and there is no separate cost of filtering that can be deducted from the cost of Internet access service. See FY 2008 Eligible Services List at p.13 (“Software”), p. 24 (“Special Eligibility Conditions, Ancillary Use”) and p. 25 (“Internet Access Service with Ineligible Features”).

⁵ See Federal-State Joint Board on Universal Service, Children’s Internet Protection Act, CC Docket No. 96-45, Report and Order, 16 FCC Rcd 8182, 8204, ¶ 54 (2001).

⁶ *Id.*

protection measures that are necessary to meet the requirements of this title and the amendments made by this title. *No other sources of funds for the purchase or acquisition of such measures are authorized by this title, or the amendments made by this title.*

(Emphasis added). The italicized sentence above apparently was the language that the FCC relied on in concluding that the statute prohibited E-rate funding for filtering software. However, the quoted language does not mention E-rate funding. Rather, the language makes clear that there are no *additional* funds authorized (appropriated) under this title to pay for filtering software.⁷ There is nothing in the law that states that existing E-rate funding cannot be used to subsidize schools' and libraries' purchase of filtering software or services.

The Report of the Committee of Commerce, Science and Transportation on S.97, which is the bill that was approved and enacted into law as the CIPA statute (Pub. Law. 106-554) validates this interpretation of the statute. As the FCC cited in the NPRM, the legislative history contains at least two separate references to authorizing the use of E-rate funds to help pay for filtering. First, the Report states at page 10:

The legislation provides that the Universal Service subsidy may be used to cover the cost of the acquisition of the software or technology necessary to comply with requirements added by the bill.

Second, the Report states at page 13:

[S]uch [E-rate] discounts may be applied to the purchase or acquisition of filtering or blocking products necessary to meet the requirements of the Act.

Although the language in the Senate version is not identical to the final language enacted into law, SECA could not identify any legislative history that contradicts or undermines this interpretation of the statute.

⁷ Section 1701 of the law makes clear that the title in question is the Children's Internet and Protection Act (Pub. Law 106-554).

To our knowledge, schools have not been able to obtain financial support from other sources of federal funding to defray the costs of filtering. Based on the feedback we have received from applicants, the costs they have incurred to implement filtering are definitely greater than they were prior to enactment of CIPA when many applicants were receiving free filtering from vendors. Last, we believe that filtering should be eligible for E-rate regardless of whether it is a stand-alone service offering or if bundled with another service. Filtering service should be eligible under Priority 1 under the Internet access service category since it is an adjunct required service for Internet access. Filtering hardware (equipment) should be eligible under the Priority 2 internal connections category of service. For bundled services that include filtering, the administrative processing time for reviewing such funding requests would definitely be reduced, because the administrator no longer would have to engage in review to insure that filtering costs were cost allocated and deducted from funding requests.

SECA wishes to be clear that its support for making filtering eligible for E-rate does *not* include similar software protection programs such as anti-virus, SPAM filtering, firewall or any other similar program that is designed to thwart unwelcome and invasive communications.⁸ While these programs may be prudent to install and use, and although many applicants use these services, they are different from filtering since only content filtering is required to be installed as a condition of receiving E-rate funding. SECA encourages the FCC to clarify this limitation on the E-rate eligibility of content filtering.

V. THE E-RATE DEFINITION OF BASIC TELEPHONE SERVICE SHOULD BE EXPANDED TO INCLUDE ALL VOICE COMMUNICATIONS SERVICES.

SECA commends the FCC for asking commenters whether the definition of basic telephone service should be expanded to include additional telecommunications services such as

⁸ FCC NPRM at ¶ 18.

Private Branch eXchange (PBX), key systems, T1 lines, interconnected VoIP and Primary Rate Interface (PRI) trunk lines connecting a PBX to the Public Switched Telephone Network (PSTN). NPRM at ¶16. As the FCC notes, by classifying these services as basic telephone service, applicants would be relieved of the obligation to prepare a technology plan that refers to and explains the applicant's use of these services. *Id.*

The purpose of the technology plan requirement is to insure that E-rate applicants purposefully plan their procurements. May 7, 1997 First Report and Order at ¶ 573. The plans are supposed to verify that each applicant has the need and resources for the services and products to be procured via E-rate, and that proper planning has occurred before E-rate funding is requested. *Id.* at ¶574. More recently, the FCC affirmed these goals in its Fifth Report and Order in CC Docket No. 02-6, FCC 04-190 (Order released August 13, 2004) at ¶¶ 55-63.

Most if not all of the services described above are used by applicants for their voice communications needs. Whether a school or library chooses to lease a POTS line or a PRI line, a PBX or Centrex, or T-1 line to meet their communications needs, all of these services are used for the same purpose. It does not make sense to require applicants to justify their choice of voice telecommunications services in their technology plans, since these services are typically modestly priced and used interchangeably.

While SECA supports the expansion of the definition of basic telephone service to include all of these services, SECA also suggests that the common denominator of these services is that they are used for voice communications. It may make more sense, therefore, to exempt all voice communications service from the E-rate technology plan requirement. This is a bright line that applicants and the fund administrator will be able to comprehend and easily implement.

SECA also suggests white page additional directory page listings and the costs of non-published white pages listings should be included as ancillary services that are eligible for

funding under the telecommunications category. These charges are a huge nuisance to applicants to identify and deduct from their funding requests, and impose a substantial administrative burden on the fund administrator to review and insure that these charges are deducted. We do not believe there will be a financial impact on the fund because few applicants are currently deducting these charges. Therefore we believe that by making these ancillary charges eligible, we will be ensuring that applicants are not cited in an audit for receiving discounts on these incidental charges.

The FCC also should include text messaging as an eligible basic telephone service. This service has become a commonplace substitute for paging service, which is eligible for E-rate. Indeed, most applicants are under the impression that text messaging was previously clarified to be eligible for E-rate funding although we do not have any written verification of this fact.⁹

SECA opposes shifting eligibility of certain services or components from the current Priority 2 category to the Priority 1 category. All equipment that is purchased by applicants such as PBXs and key systems should remain in the Priority 2 category and should not be changed to Priority 1 because of the precedent that would be set for other such bundles, and because of the severe impact it would have on Priority 1 demand. We estimate that if such a shift were to occur, Priority 1 demand would exceed the entire \$2.25 billion cap in the first year of eligibility.

VI. THE E-RATE STATUS OF DARK FIBER SHOULD REMAIN UNCHANGED

Our experience is that applicants have been well educated and informed about the current ineligibility of dark fiber. They understand that lit fiber service, provided by a telecommunications common carrier, may be used for both telecommunications and Internet access service. Lit fiber that is provided by a company that is not designated as a

⁹ FCC NPRM at ¶ 18.

telecommunications common carrier may be used only to obtain cost effective Internet access service and any other uses of that service (for data or voice telecommunications) must be cost allocated and deducted.

Applicants also learned, following the FCC's prior designation of dark fiber as ineligible, that a dark fiber service may be converted to a lit fiber service as long as the service provider offers a bundled solution that lights the fiber. We believe that the current eligibility status is consistent with the FCC's Fourth Order on Reconsideration CC Docket No. 96-45 (FCC 97-420)(Order Released December 30, 1997), in which the FCC clarified that wide area network service may be leased and funded as part of Priority 1 service, but that the E-rate program is not intended to fund the purchase and installation of wide area networks. *Id.* at ¶193. We are concerned that if dark fiber service and/or facilities are deemed eligible, this determination may have the effect of encouraging applicants to purchase and install their own wide area networks, which is contrary to the FCC's Fourth Order on Reconsideration.

VII. TELEPHONE BROADCAST MESSAGING SERVICE SHOULD REMAIN INELIGIBLE FOR E-RATE

Telephone broadcast messaging service is becoming increasingly more commonplace for schools to use to transmit outbound messages to parents and other members of the community. While the service no doubt has a useful purpose, it does not transmit communications and the Internet to classrooms and libraries but rather it transmits outbound calls. As such, it does not meet the statutory and regulatory requirements that Congress and the FCC have established for E-rate funding.

Although the service may be touted to be necessary for public safety and awareness, broadcast messages for purposes other than safety – such as reminders of upcoming non-emergency school events – are equally common. SECA also is concerned that the cost of the

service will impose substantial upward pressure on the E-rate funding cap. We are aware that several companies offer a fee-based, per student annual subscription fee of about \$3.00 per student. According to NCES, there are approximately 49.8 million students enrolled this fall in public elementary and secondary schools, from grades pre-K through 12 grades. At the cost of \$3.00 per public school student, the likely cost to the fund would be \$150 million annually and that figure does not take into account the impact of library and private school E-rate applicants' requests. There simply is not sufficient funding available to subsidize this non-essential service and it would be extremely difficult, if not impossible, for applicants to perform a cost-allocation so that E-rate only pays for emergency calls and not other non-emergency related messages.

VIII. 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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