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

In the Matter of	)	
	)	
Schools and Libraries Universal Service	)	
Support Mechanism Second Report and Order	)	
and Notice of Proposed Rule Making	)	CC Docket No. 02-6

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Office of the Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

RE: Reply Comments on the Notice of Proposed Rule-Making and Order, Adopted April 23, 2003, Submitted by Funds For Learning, LLC

Funds For Learning, LLC, is an educational technology consulting firm that has focused its practice on the E-rate program since the program's inception in 1997. We have participated in both the Commission's May 8, 2003, Forum on the E-rate Program, and the Schools and Libraries Division's Task Force on the Prevention of Waste, Fraud and Abuse. From our experience in working independently with both applicants and vendors on E-rate-related issues, we offer these comments in response to the initial round of comments filed in the above referenced rule-making.

Implementing Changes to Address Waste, Fraud and Abuse

Many suggestions have been made of ways that the potential for waste, fraud and abuse in the E-rate program could be addressed. Some would amount to major programmatic changes and others would be less dramatic. In every case, however, the Commission and the Schools and Libraries Division need to take care to ensure that program changes do not lead to new problems. For instance, new rules can simply create more confusion and the potential for new loopholes. Changes designed to address market distortions that the rules have created may only create new distortions. New levels of review may only increase the burden on those applicants and vendors who have tried faithfully to follow program rules.

We believe that the applicants and vendors who participate in the program can provide the most valuable ongoing input to the Commission and the SLD in addressing these issues. We encourage the Commission to continue to work in partnership with both the applicant and vendor communities to try to address the root causes of any problems in a cost-effective way.

Eligible Services

A good example of the need for ongoing discussions was demonstrated in the area of Eligible Services. We noted that a number of commenters (including the State E-rate Coordinators' Alliance, Nextel, and Verizon) joined us in asking the Commission to clarify some of the positions that it took in its Second Report and Order on April 29, 2003. It is critical that these issues be addressed immediately so that vendors can market their E-rate-eligible products accurately and so that applicants can prepare their applications for the 2004 funding year correctly. To the extent that applicants are supposed to distinguish between eligible and ineligible services when they analyze the cost-effectiveness of bids, this may already be an issue for applicants who have already posted Form 470 applications this year in conjunction with Requests for Proposals. Applicants and service providers must be given clear guidance on these issues *before* they submit their applications for the 2004 funding year, not in the middle of application review, as has been the case too often in the past.

Many proposals under consideration and comments that have been filed address determinations of eligible services. We believe that there are several key principles that need to be kept in mind as comments in support or opposition are analyzed. We believe that most stakeholders would agree with these principles:

- Applicants need to receive the best possible guidance they can on how products will be evaluated *before* they submit their applications.
- Vendors with complicated products deserve equal access to product review, if they choose, in advance of their marketing cycles.
- Information about eligible services must be communicated in a clear way that leads applicants to prepare their applications correctly. The SLD should err on the side of helping applicants and vendors understand the rules, rather than appearing to play "gotcha" games during application review.
- Applicants and vendors need to be supported so that they can prepare their descriptions of services and subsequent invoices in ways that will pass muster when they are reviewed by the SLD staff.

We believe these core principles may have gotten lost in the discussion over the pros and cons of "an online eligible services list," the pilot for internal connections and proposals to extend those trials for Priority One services. Concerns have been expressed about whether public lists would drive applicants to pre-approved products, whether the SLD could keep such a list current, whether such a list is necessary for Priority One services and so forth.

Applicants and vendors have a right to have access to the same information that the SLD's Program Integrity Assurance team uses when it rejects or reduces funding commitments. An applicant deserves to know that a "Cajun SMON stack license" will be trimmed from an otherwise eligible request for network electronics, and an "Avaya Telset 6416DO2B USA GRY AC" is a telephone that does not belong in an otherwise eligible request for a PBX. Yes, there will always be new products, vendors selling new products and applicants who want to buy new products. And yes, there will be some risk for applicants who want to seek discounts for new products for which the SLD's formal review has not yet been completed. However, we contend that applicants continue to be at risk until and unless the SLD develops a formal product review process, permits vendors to submit their products for review, and publicizes the results.

How should those results be communicated? Start by posting a monthly update to the SLD's formal eligible services list that will detail the SLD's current eligibility determinations, as well as service substitutions that the SLD has determined do not have to be submitted for review (e.g., routers for routers).

Although we think their customers would benefit from this information, we see no particular benefit in requiring the telephone companies to prepare and submit lengthy lists of the names under which their services are marketed. At the same time, we think the SLD and Commission need to be more proactive in helping applicants prepare their applications correctly. In fact, we believe the worksheets that some telecommunications carriers have proposed may not go far enough. We believe that the SLD's online application questionnaire should be dramatically overhauled to help applicants complete their applications successfully and address common problem areas. For instance, an applicant could be led through these questions before submitting a monthly phone bill as back-up for discounts on traditional phone service:

"The SLD will accept as back-up documentation a monthly phone bill. Before calculating your monthly request, please review this bill and exclude any charges associated with these items:

- Charges for special telephone equipment, such as enhanced phone sets
- Charges for directory advertising
- Any one-time charges that inflate this bill over the amount of a typical monthly bill
- Any past-due charges that inflate this bill over the amount of a typical monthly bill
- Any long-distance charges that should be part of a separate funding request
- If you receive Centrex service, you will be expected to have an approved technology plan. If you do not know whether you receive Centrex service, please consult your carrier."

Similarly, additional voluntary Description of Services worksheets should be prepared to encourage applicants to consider and proactively address areas of potential PIA concern, such as eligibility determinations.[1]

We believe that the Task Force on the Prevention of Waste, Fraud and Abuse has made a number of useful suggestions for providing clarification to applicants about eligible services. We believe that the notion of a "computerized online eligible services list" is a proposal that may have some merit but is also serving to confuse some of the underlying issues about the overriding need for greater clarification and direction in this area.

Invoicing

Separately, the SLD needs to address a related issue that threatens the future economic viability of the E-rate program—delays that are holding up the processing of some invoices. The SLD's invoicing manager recently told a conference call of E-rate vendors that invoices were delayed only when the Universal Service Administrative Company had turned up possible violations of program rules or "service substitutions" that had not been submitted for review. Nevertheless, the Form 486 acknowledgement letter now advises applicants that it may take 90 days to review their

[1] In 1999, Funds For Learning developed E-rate Advisor, a standalone software solution that was designed to guide schools and libraries through the preparation of their applications for the 2000 and 2001 funding years, much the way software programs are available that can help taxpayers prepare their income taxes. Now that most applicants are submitting their applications online, we believe that the SLD's online application questionnaire could be enhanced by additional attention to the fundamental errors that applicants tend to make and the kinds of questions that can typically arise during application preparation.

payment paperwork, a significant increase from the 20-day review that the SLD cited in its early days.

USAC needs to exercise an appropriate level of review over invoices. It must also reconcile this review with the need to provide a streamlined mechanism for vendors to get paid. At the same time that the SLD is encouraging vendors to make use of electronic invoicing, it is relegating other vendors to "invoice limbo" for months at a time and with no standards for invoice submissions, review or appeal. As USAC demands increasing amounts of back-up for invoices, it needs to develop much clearer—and reasonable—standards for applicants and vendors to follow. At a minimum, USAC should find a way for the invoice reviewers to access Description of Services documents and files from Program Integrity Assurance so that applicants and vendors are not subjected to the same questions that they successfully addressed many months before.

We noted that several commenters supported a recommendation that the School District of Philadelphia made in response to the Commission's first Notice of Proposed Rule-Making in this docket in 2002—namely, that applicants be permitted to notify the SLD that they wished to review the Service Provider Invoices of particular vendors through a checkoff mechanism on either the Form 471 or the Form 486.

We believe that this is a reasonable mechanism that would address a program concern—namely that an applicant has no way to review the invoices that a service provider submits to the SLD for payment. The applicant can be, if it chooses, the first line of defense in cases where an invoice is applied to the wrong funding request, does not exclude ineligible services, charged too much or duplicated another bill. In the May 31, 2002 audit of 24 program beneficiaries that was performed by Arthur Andersen, the auditors found that for half of the applicants that were reviewed, service providers had submitted Service Provider Invoices to the SLD that exceeded the cost reflected in the invoices submitted to the applicants.[2]

We recognize that some service providers are understandably concerned that giving applicants this option would simply add another level of bureaucratic delay to this process. We urge the Commission and the SLD to identify a mechanism through which applicants can help the SLD monitor their vendors' submissions without adversely burdening the SLD staff or unduly slowing

[2] Universal Service Administrative Company, Schools and Libraries Support Mechanism, "Agreed-Upon Procedures Report of Independent Public Accountants," May 31, 2002.

the invoicing process. We believe that the recommendation of the State E-rate Coordinators' Alliance is a good place to start.

Competitive Bidding

The core dilemma that the Commission faces is how to promote a competitive bidding process that is fair to all responsive bidders, promotes the selection of cost-effective technology solutions, and is not overly burdensome to time-strapped school and library officials. Further, such a system must cover entities—namely private schools—that are not subject to state and local procurement rules. We do not have an easy solution for modifying the current system, which requires an applicant to post a Form 470 application at the same time it is making a procurement decision on E-rate-eligible services. However, we make these observations in response to the comments we have read, or statements that we heard at the FCC's May 8 Forum on the E-rate program:

- Faced with the choice of thousands of potential customers that they could pursue, businesses cannot be faulted for pursuing those that offer the greatest potential reward or the strongest assurance that they will qualify for discounts. While we believe some marketing practices have been inappropriate, we believe that technology companies should not be faulted for giving greater priority to high-discount schools and libraries, or to the largest customers. Vendors *will* pursue lower-discount applicants when they have greater assurance that those applicants will be able to qualify for both Priority One and Priority Two funding.

- The Commission and the SLD should promote greater competitive bidding by conducting outreach to state-level IT and procurement staffs to encourage them to make more statewide contracts eligible for E-rate funding. Many E-rate applicants can avoid conducting their own RFP, a complicated, time-consuming process for most school and library officials, if they purchase off of a state contract. However, when the state has not posted its own Form 470 application, the applicant is forced to take that step itself. When an interested vendor calls, it may be told that the applicant "only buys off of the state contract." This creates frustration for the vendor, and may bring the application under scrutiny. The alternative is to modify the Form 470 application so that an applicant can acknowledge that it is subject to this restriction upfront.

- At the same time, the Commission must recognize that the Form 470 process has, in fact, worked in many cases. While many telecommunications services and network installation services are procured on a regional basis, we know that the E-rate program has enabled many companies to build nationwide businesses in providing cutting-edge technologies and services to school districts and libraries. For them, the Form 470 process is the equivalent of "advertising an RFP in a local newspaper." We believe that the Telecommunications Act of 1996 was designed to promote competition in providing advanced services to schools and libraries. While the process has not been perfect, we assert that the Form 470 *has* promoted competition.

- The Form 470 should be modified so that applicants can, if they choose, be *more* specific in their descriptions of their projects. When the Form 470 was modified before the start of the 2000 funding year, the form was revised in a way that led many applicants to provide less information rather than more. No wonder many complain that they get spammed by vendors selling products in which they have no interest. Applicants should be clearly instructed that they are free to ignore vendors pushing products that they did not list, and that they are free to impose appropriate restrictions that would serve to limit the number of companies with whom they would have to deal.

Regulation of Consultants

As a consulting company that has focused its business on the E-rate program since its inception, we have continued to wrestle with the question of how best to regulate consultants in ways that will effectively address some concerns about the potential for waste, fraud and abuse.

First, we think it is worth noting that no matter how streamlined and simplified the E-rate program may become, some applicants are still likely to be motivated to hire consultants to prepare their applications. According to the Internal Revenue Service, 59.9 percent of U.S. taxpayers paid someone to prepare their Form 1040 in 2002, including nearly one-fourth of those taxpayers who completed the supposedly easy Form 1040EZ.

If the Commission and SLD take steps to regulate "E-rate consultants," the first step will be to define precisely who falls under that definition. Many people provide free informal guidance to applicants, including vendors and state E-rate coordinators. Because we believe no one intended

to regulate all forms of this "informal" support, we believe that consultant registration would need to be limited to persons who actually complete the Form 470 and Form 471 application forms on behalf of schools and libraries. We believe that it is appropriate for these people to register with the SLD and to receive a consultant identifier.

The area that appears to be of greatest concern to policy makers are instances in which consultants advise schools and libraries on technology planning and procurement decisions, and then benefit financially, without the school or library's knowledge, based on the recommendations they have made. This is analogous to the personal financial adviser who makes recommendations without the client understanding how the adviser stands to benefit, presumably through commissions, from the products they decide to purchase.

We support the recommendation of the Task Force on the Prevention of Waste, Fraud and Abuse, calling on the SLD to develop a standard disclosure form that persons who prepare E-rate applications could use to disclose—to their clients—the names of any vendors with whom they have financial arrangements. This model is analogous to the model followed by the legal community—a law firm may have potential conflicts of interest in representing the interests of a variety of clients. The critical issue is whether those potential conflicts have been disclosed to a client and whether the client has "waived" the conflict. The SLD should require that application preparers register with the SLD and file a disclosure statement with their applicant clients. The applicant will then be in a position to demonstrate that it was aware of the potential conflict, and protected itself from it, in the course of the applicant's procurement decisions. In the case of consultants who prepare applications for "free," because they are paid by the vendors whose products are chosen, that will be more difficult to prove.

This kind of approach will only work if it is coupled with more effective education on the proper roles of applicants, vendors and consultants. Applicants and vendors must be given clear rules on what kinds of assistance are appropriate and what kinds are not. Because these practices have come under increasing scrutiny in recent years, we encourage the Commission and the SLD to move forward quickly to publicize the practices that have been found to be unacceptable so that stakeholders can adjust their processes accordingly.

Debarment and Other Penalties

Many commenters have encouraged the Commission to impose stricter penalties on vendors and applicants who are found to have intentionally and repeatedly violated program rules. However, the National Association of State Utility Consumer Advocates was among those who expressed concern about the impact of these penalties.

> "When a school is debarred, it is not, in the end, the school that is deprived of E-rate funded services. It is the children in that school who are deprived. Many of those children are currently on the right side of the digital divide only because of E-rate services. None of them, almost certainly were complicit in any abusive act." [3]

NASUCA goes on to draw the line at "a school that has engaged in a multi-year conspiracy with a provider to fake internal connection projects and split the money." But it says, "In deciding what to punish and how to punish, the Commission should always consider first the welfare of the ultimate program beneficiaries—the children."

We are sympathetic to this argument, and we are sure that the Commission is, too. We know that the Commission currently is considering appeals involving a number of very poor, very large urban school districts, whose funding requests, totaling several hundred million dollars, were rejected for the 2002 funding year. Everyone recognizes that the children in those school districts are likely to suffer because their district will undergo additional financial stress because its E-rate application was rejected in whole or in part. But what about the children in those school districts who were judged to have followed the rules? What about the children in those school districts who followed the rules, but were not quite "poor enough" to qualify for internal connections support in 2002? What about children in those school districts whose applications were rejected by the Commission in earlier years because of a clerical error, because an appeal was filed too late, or because a school official used the previous year's application form? The Commission must apply rules consistently. And that means school districts must be held accountable for their actions, even if it means their students ultimately will pay the price.

We believe that the Commission and the SLD must establish some sanctions—short of program debarment—that will bring those applicants who fail to pay close enough attention to the rules under increased scrutiny and auditing, with the possibility of

[3] Comments of the National Association of State Utility Consumer Advocates at p. 5.

required training. Otherwise the actions of a relatively few schools and libraries will foster an atmosphere in which the program loses political support and those applicants who faithfully follow the program rules—and the children they serve—*are* deprived of the discounts that they deserve.

The Commission must firmly establish that while the E-rate program confers privileges, it also entails responsibilities. It is decidedly not an entitlement program.

We note that in its comments, EdLiNC cautioned the Commission against "applying government-wide regulations to E-rate and involving the Department of Justice in any investigation."[4] We fully appreciate the special status that the E-rate program enjoys because it is not a federal program, per se. Nevertheless, if the Department of Justice can help the Commission rid the program of those elements that have sought to defraud our nation's children, we would support the department's involvement.

Further, we encourage the Commission to consider the federal government's current position in regards to auditing for federal funding programs in deploying its own limited auditing resources. Entities are not subject to the Single Audit Act unless they receive at least $300,000 a year in federal funding (the Office of Management and Budget has proposed increasing that limit to $500,000). We believe that the E-rate program's auditing and review requirements should be graduated, so that a librarian seeking the same discounts on T-1 service to a single building for the fifth year in a row is not subjected to the same requirements as a statewide network or large school district seeking millions of dollars in support for new services. Similarly, a school district whose funding requests have stayed consistent and passed muster should not be subjected to the same scrutiny year after a year as a charter school that thinks it needs a substantial amount of money to build a new network.

[4] Comments of the Education and Library Networks Coalition (EdLiNC) at p. 2.

Summary

In closing, we wish to commend the Commission for its efforts to preserve the E-rate program. We also acknowledge the difficult task that SLD and FCC staff members face in trying to ensure that the program's rules are enforced in a fair and equitable manner. We hope to continue to work with SLD and Commission staff on these challenging issues in the months ahead.

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