

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

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In the Matter of)	
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Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	
)	
A National Broadband Plan)	GN Docket No. 09-51
For Our Future)	
_____)	

**COMMENTS OF THE NEW YORK STATE EDUCATION DEPARTMENT
IN RESPONSE TO THE MAY 20, 2010 NOTICE OF PROPOSED RULEMAKING
(FCC 10-83)**

The New York State Education Department (“NYSED”) submits these Comments in response to the FCC’s Notice of Proposed Rulemaking released May 20, 2010, designated FCC 10-83, seeking comment on prospective changes to the E-rate program to both simplify the program and encourage broadband deployment. These Comments also address selected service eligibility issues in FCC proceedings FCC 09-105 and DA 10-1045.

At the outset, NYSED wishes to express its strong support for the E-rate program and for the efforts made on its behalf by the Federal Communications Commission (“FCC”) and the Universal Service Administrative Company (“USAC”). From the program’s inception through June 30, 2010, New York State E-rate applicants have been awarded funding of approximately \$3.7 billion in E-rate discounts. This funding has permitted New York schools and libraries to purchase and install technology and telecommunications equipment and services that otherwise would have been far beyond their financial capabilities. Even for our lower discount applicants, not qualifying for Internal Connections, we have seen how E-rate has encouraged early adoption of broadband Internet and other services.

Streamlining vs. Simplification:

Because of the importance of E-rate to our State, and without any offsetting federal support, NYSED has worked diligently to encourage participation by all entities. NYSED has put in place a comprehensive technology plan approval process; maintains extensive Web resources for NSLP data, state master contracts, E-rate funding data, application tips, and sample documents; distributes a detailed weekly E-rate newsletter; provides E-rate workshops throughout the State; and helps resolve specific problems on behalf of its applicants.

Despite our efforts, not all New York schools and libraries apply for E-rate directly or through consortia. Even those who do apply encounter difficulties in the application process. While simple in concept, the E-rate application process is complicated in practice. Often this has more to do with USAC's administrative procedures than with the underlying FCC rules.

As discussed below, NYSED is concerned that the FCC's "streamlining" proposals may actually complicate, rather than simplify, the application process for everyone by creating different sets of procedures for different types of applicants in different states. Even those applicants, who might qualify for exemptions from one or more steps in the application process, may find themselves subjected to greater scrutiny as to their qualifications for those exemptions.

As a general rule, NYSED favors changes that would uniformly simplify the process for all applicants rather than create separate rules and procedures for certain applicants.

Technology Planning Requirements:

NYSED believes that technology planning is a worthwhile endeavor for all schools and libraries. In New York, however, aside from E-rate, only the Title II D (Enhancing Education Through Technology, or "EETT") schools are required to submit technology plans to NYSED.¹ Given the questions regarding the future of EETT funding, even this technology planning requirement is suspect. Additionally, it should be noted that NYSED merely checks to see if EETT plans have been completed; it does not review them in depth, much less approve them.

The review and approval of E-rate technology plans therefore, is the only broadly administered technology planning process used throughout New York State. Although the required plan components are more hardware-based, as opposed to a more curriculum-based plan for schools or a more service-based plan for libraries which NYSED would prefer, the process has proved valuable. In particular, the plan approval process under which public school plans are reviewed by regional information centers, public library plans are reviewed by regional library systems, and many Catholic school plans are approved by their dioceses, has led to better statewide coordination.

Exempting a relatively few public schools from the need to meet E-rate technology plan requirements would do little to assist the majority of New York applicants. For the few potentially exempted schools, NYSED would be concerned that USAC procedures to check

¹ In addition, schools applying for State school construction funds are required to include a technology component in plans submitted to NYSED.

exemption status, timing of plans, and plan content would create confusion and/or additional administrative burdens on both the schools and on USAC.

If the FCC were to do one thing to simplify the E-rate technology planning process for all applicants, NYSED recommends that it eliminate the pre-Form 470 plan creation date requirement, focusing instead solely on the plan approval date. Since technology plans are evolving documents, and since “evaluation” is one of the required components, applicants having currently approved plans in place as of the date of their Form 470 filings should be deemed to be in compliance. The current creation date requirement is the source of considerable confusion and denials. It is also one — unlike the approval requirement — that is exceedingly difficult to monitor by state and regional E-rate coordinators.

NYSED notes that a similar recommendation for the elimination of the technology plan creation date requirement was made by the State E-rate Coordinators’ Alliance (“SECA”) in early 2007. The FCC requested comments on this recommendation in April 2007 (DA 07-1846), to which E-Rate Central, on behalf of NYSED, responded positively. We hereby reaffirm our support for this recommendation.

Competitive Bidding Requirements:

One of the NPRM’s major proposals is to streamline the application process by eliminating the Form 470 filing requirement on Priority 1 services for applicants subject to public procurement requirements. Since New York, like most states, has procurement rules governing purchases by public entities, the proposed Form 470 exemption would presumably apply at least to most public schools in our State.

Eliminating the Form 470 filing and related requirements for certain classes of applicants would clearly “streamline” the application process for these applicants. But NYSED questions whether this exemption would simplify the E-rate process for anyone.

Several of the more important issues related to the Form 470 proposal, not addressed in the NPRM, include the following:

1. Who will decide if a specific applicant is exempt from filing a Form 470? Will it be the applicant itself (subject to second guessing by USAC), or will USAC take it upon itself to review the adequacy of each state’s or territory’s procurement regulations, and identify all exempt classes of applicants in each?
2. Typical state procurement rules have different provisions based on purchase levels and on classes of products and services. If, for example, competitive bids are required only for purchases exceeding \$25,000, would a school district still be exempt from filing a Form 470 for lesser amounts of service? If so, why impose a Form 470 requirement on a private school seeking the same level of service?
3. How would state master contracts be treated? Would state purchasing agencies, such as New York State’s Office of General Services, be required to file Form 470s if their rules had not been “established by another governmental body?” Would all applicants — including private schools— be exempt from the Priority 1 Form 470 requirements if all

their purchases were based on state master contracts? Would the rules differ depending upon whether a given state master contract was single-sourced, competitively bid, or part of a multi-vendor award?

The most important issue is the procedural handling of applications during Initial Review, Selective Reviews, Special Compliance Reviews, appeal reviews, and audits. For applicants with Form 470 exemptions, is the FCC willing to turn over all procurement enforcement to the states, or will USAC be responsible for assuring that all state procurement rules have been followed? If the latter, NYSED believes that complications introduced in the post-application review process will more than offset the benefits of streamlining the pre-application procurement process for some applicants.

Fair and open competitive bidding has been a cornerstone of the E-rate program since its inception. This is not unreasonable. NYSED believes that it is proper for the FCC, through USAC, to retain basic oversight of applicant procurement practices. Rather than attempting to “streamline” part of the process for certain public applicants, the FCC should aim to simplify the procurement process and oversight procedures for all applicants. We recommend the following:

1. Retain, but simplify, the Form 470 process for all applicants. The Form 470 itself could be simplified by eliminating unnecessary elements, often the source of future funding denials, including:
 - a. Block 2, Item 7;
 - b. The RFP/non-RFP distinction in Block 2, Items 8-11;
 - c. The separate Telecommunications/Internet Access and Internal Connections/Basic Maintenance categories of service in Block 2;
 - d. Block 3; and
 - e. The area code/prefix listing in Block 4.
2. Leave the enforcement of state and local bidding rules entirely up to the states.

NYSED encourages the FCC to show restraint in providing “illustrative guidance” in the interpretation of its procurement rules. As shown in the past, such illustrations have a tendency to lead to hard and fast procedural tests when interpreted by USAC. Many of the proposed guidelines seem best suited for multi-billion dollar federal contracts than for the real world situation faced by smaller schools and libraries, many without strong technical assessment capabilities of their own. E-rate procurement rules must be more balanced. We are particularly concerned with the proposed guidance, such as:

1. Overly strict restrictions on employee/board vendor affiliations and ownership. New York case law provides somewhat greater flexibility with respect to fiduciary responsibility, disclosure of substantial financial interest, and procedures to recuse an individual from specific decisions.

Additionally, we note that the board affiliation prohibition would be particularly problematic for any of our Boards of Cooperative Educational Services (“BOCES”) that act as E-rate service providers. As is the case with various educational service agencies in other states, BOCES boards are typically comprised of representatives of their member districts. Any prohibition of this nature should explicitly exempt BOCES and other

educational service agencies that are otherwise complying with USAC's published ESA guidelines.

2. Post-contract restrictions, assuming no breach of contract, on the acceptance of new and lower prices.
3. The provision of vendor product and service information — including demonstrations — during the bid selection process. It is precisely during this process that less technically proficient applicants may need more information.

Electronic Forms:

The most important E-rate forms are already online and are being used by a large and increasing number of applicants. NYSED encourages the FCC and USAC to expand and improve the capability of electronic forms. At a minimum, systems and forms need to be stabilized (e.g., to limit time-outs and other system errors) and upgraded to make them more user-friendly.

The development of an E-rate portal is a promising idea and should be pursued — but not in a vacuum. In particular, USAC should be directed to reach out for ideas to large applicants and consultants who have developed systems of their own to capture, store, and maintain historic funding data and to facilitate new filings.

It is far too premature to mandate that all forms be filed electronically. This should be done, if at all, after USAC completes the development of a portal and new online filing systems, and after applicants have had a couple of years to fully test these improvements. If new developments are successful, applicants currently filing offline will be encouraged to migrate to filing online. If this occurs, USAC data entry of paper forms will likely become a non-issue — except as a backup option in the event of a system failure.

Discount Matrix:

The advantages or disadvantages of applying a single discount rate to school districts would depend entirely on how such a change is implemented. In particular:

1. Requiring only a total enrollment number and a count of total eligible students to calculate a district's discount rate would greatly streamline and simplify preparation of Block 4 of the Form 471 application — if that was the only information requested. It would be a major benefit for large school districts such as New York City that has 1,500 schools, often co-located in buildings and reorganized throughout the year.

However, if every site must still be listed in the Block 4 (or even in an addendum), subject to individual USAC review, there is nothing to be gained.

2. The application of a matrix discount to a school district based on the total student eligibility percentage would create winners and losers. A district's current aggregate discount could move up or down to a matrix level. Generally, a district's discount would move up if the current aggregate discount is above the halfway point of that discount rate

band, and move down if it was below that point. For discounts currently in the middle of the band, the change could be in either direction. In the 60-80% band of the current matrix, the difference could be a swing of 10-11%.

3. Moving all applicants to matrix discounts — at least using the current matrix — would create demand spikes at each level. Presumably, this would make it more difficult for USAC to allocate limited Priority 2 funding without introducing a secondary mechanism for sub-allocating funding at any given matrix discount level.
4. Points #2 and #3 above suggest that a change to a single discount rate should be accompanied by a change in the matrix itself, replacing the existing broad matrix bands with a more granular approach (e.g., 5% bands). Alternatively, the matrix could be eliminated entirely by substituting a simple formula based on an applicant's percentage of eligible students, plus a fixed increment (e.g., 15-25%), and capped at 90% (or less). One such approach is discussed further below.

Rural vs. Urban Designation:

NYSED recognizes that the current MSA/Goldsmith method of designating schools as rural or urban is not perfect, but warns that alternative methodologies may also be problematic. In particular:

1. Any change would create transitional problems as applicants and USAC seek to confirm and/or change rural-urban designations on a site-by-site basis.
2. NCES does provide rural-urban classifications on a school-by-school basis, but only for established schools. New schools may not be listed in NCES data for 1-2 years. Libraries are not listed at all.
3. Use of a single district-wide discount rate would require a process for determining a district's classification if some of its schools are rural and others are urban.

NYSED suggests that it may be time to reconsider rural-urban designations altogether. While the facility costs of providing Priority 1 services in rural areas may be higher than in urban areas, rates are already subsidized by the High Cost Fund. The costs of providing Priority 2 services in rural areas may be inflated by such factors as travel expenses, but service costs in urban areas may also be inflated by such factors as prevailing wages.

Eliminating discount matrix differences between rural and urban applicants would make the rural-urban designation issue moot and would simplify the program.

Wireless Off-Premise Internet:

NYSED recognizes and supports the trend to “24/7” education and understands the importance of providing Internet access to students outside of school. Given the current funding limitations on the E-rate program for existing eligible services, however, we see no feasible way to provide additional funds — conceivably an open-ended demand for funds — for wireless off-premise Internet services.

NYSED notes that many other aspects of the FCC's National Broadband Plan are designed to increase the availability, affordability, and adoption of broadband Internet services to all family members, not just students.

Dark Fiber:

NYSED supports any eligibility changes that would provide additional flexibility and E-rate support for broadband services to schools and libraries. The proposal "to make leased dark fiber from any source eligible for funding as a priority one service" is a step in the right direction, but does not go far enough. In particular:

1. Limiting the leasing of services by non-carriers to "dark" fiber is unduly restrictive and, from a technical standpoint, almost immaterial. As currently administered by USAC, the difference between ineligible "dark" fiber and eligible "lit" fiber usually depends only upon whether the carrier or the customer is providing the optical transceivers (often called "GBICs"). Cost wise, the difference is inconsequential. If the Commission is ready to permit the provision of leased fiber services from any source — the real benefit of the proposed change — it should not matter which party provides the GBICs.
2. Requiring that leased fiber be used immediately may be shortsighted. The extra cost to the fiber provider, and presumably for a customer negotiating a lease, to include extra strands for future use is small. Given the growing demand for bandwidth, having extra capacity in reserve would greatly facilitate future WAN expansions at cost-effective rates.
3. Similarly, given proper amortization schedules to limit the impact on E-rate funding, the Commission should consider making purchased fiber eligible.

As indicated above, the real advantage of the proposed change in fiber eligibility is to permit the provision of services from non-carriers. In New York, for example, the BOCES have been instrumental in providing broadband WAN services to their member districts. Only a portion of their services — including procurement, system design and installation support, and ongoing network management — are currently supported by E-rate. There are two models, namely:

1. The BOCES may create consortia to procure leased services from Eligible Telecommunications Providers ("ETPs"), but only the direct cost of those leased services are E-rate eligible. BOCES management costs are not.
2. Alternatively, the BOCES may act as Internet service providers, bundling leased third-party services with their own management services, into an integrated WAN package. Member districts applying for E-rate on these services, however, are currently required to cost-allocate out anything but Internet access.

Permitting BOCES to provide a full array of leased telecommunications and Internet services to their districts, as contemplated by the proposed change, would promote the expansion of regional broadband networks.

Funding for Internal Connections:

Funding of the E-rate program, as it exists today, is clearly insufficient. With Priority 1 demand accounting for more and more of the \$2.25 billion annual cap, the funds left for Priority 2 are neither enough nor predictable. Were it not for roll-over funding, there would be little left for Priority 2. Even with roll-over (recently inflated by reserve adjustments), Internal Connections funding down to the 80% level or below has been inconsistent. Many otherwise needy schools and libraries have received no Internal Connections funding — ever!

Options for fixing this problem are limited. More money would help. But given other demands on the Universal Service Fund in its totality, significant increases to the Schools and Libraries program appear unlikely. The proposal to begin indexing the E-rate fund to inflation is a small step in the right direction. Although NYSED supports this proposal, we note (as we expect others will too) that this step is unlikely to provide any significant short-term benefits.²

The only other alternative is to spread the money around differently. There are two basic ways to do so, either singularly or together, namely:

1. Making certain services ineligible to provide more funding for the remaining eligible services.
2. Reduce discount rates by capping the maximum rate at 70-80%³ and/or decreasing rates across the board.

Such changes would create winners and losers. Tradeoffs like this are painful, but NYSED suggests that now may be the time to fundamentally restructure the Eligible Services List and/or the discount matrix. If the goal is to make more funding available for Priority 2, then the only real solution is to reduce funding for Priority 1.

Here's one possible scenario for replacing the existing discount matrix with granular discount rates based on an applicant's NSLP percentage and a fixed percentage increment (as suggested above). This example assumes a 15% increment for both rural and urban, a 20% minimum, and an 80% maximum. As shown in the comparison table below, this would generally reduce discounts rate across the board. By lowering discounts for Priority 1, additional funding would be available for Priority 2. Since discounts for Priority 2 would be lower as well, funding should reach down to a wider applicant base.

² One other approach that has been discussed, though not included in this NPRM, would be to reinstate an earlier, pre-ADA, practice of over-committing funds (knowing that a percentage of awarded funds go unutilized). This would probably require a permanent ADA exemption. Moreover, its benefits would be short term. Over time, it would reduce the availability of roll-over funding.

³ As previously proposed by the State E-Rate Coordinators' Alliance ("SECA") or USAC's Task Force on Waste, Fraud, and Abuse.

NSLP %	Current Discount		Revised Discount Urban and Rural NSLP % + 15 %	Difference
	Urban	Rural	20% Min.-80% Max.	
<1	20	25	20	Equal
1-19	40	50	20-34	Lower
20-34	50	60	35-49	Lower
35-49	60	70	50-64	Lower - slightly higher
50-74	80	80	65-80	Lower - equal
75-100	90	90	80	Lower

With respect to other Commission proposals to increase funding for Internal Connections, NYSED takes the following positions:

1. Regardless of other changes, the 2-in-5 Rule should be eliminated. This rule has proven to be ineffective in reducing overall Internal Connections demand and has merely added to the program’s complexity.
2. Support for basic telephone service (i.e., POTS) should not be eliminated or reduced. The case for doing so would be ameliorated by changes to the discount matrix as discussed above. For many small applicants, discounts on these services are an important source of funding to support other technology.
3. The proposals for eliminating the eligibility of Web hosting and/or basic maintenance appear to have more to do with the difficulty of allocating or controlling the eligible costs of these services rather than a fundamental determination that the services are unimportant. NYSED favors retaining eligibility of these services, together with the development of more transparent guidelines for cost-effectiveness.
4. The problem with per student caps on Internal Connections funding — aside from the fact that the suggested \$15 per student would be insufficient — is that such caps would have a perverse impact in either direction. Applicants needing more than the capped amount might be unable to afford an otherwise valuable and cost-effective project, while applicants actually needing less may be incented to add unnecessary equipment. Establishing minimum amounts, not tied to the number of students, raises similar problems.
5. Set asides for Internal Connections raises the specter of having to establish funding thresholds each year for both Priority 1 and Priority 2 services. Such an effect would add to the complexity of the program and would likely drive the lower discount applicants out of the program entirely. As indicated above, NYSED believes that a restructuring of discount rates across all applicants, with a minimum discount (e.g., 20%), is a fairer way to apportion limited Priority 1 and Priority 2 funds for all applicants.

Schools that Serve Unique Populations:

Although care must be taken to define schools serving unique populations, NYSED agrees with the proposal to extend E-rate eligibility to associated residential facilities. The education of

students in these schools is truly a 24/7 undertaking with instruction taking place in both regular classrooms and in the residences.

Equipment Disposal:

NYSED thanks the Commission for addressing the equipment disposal issues raised in E-Rate Central's petition for clarification filed on our behalf in 2006. Uncertainty as to equipment disposal rules has been a growing problem as the E-rate program has matured. Many applicants have been storing unused, obsolete equipment to avoid potential E-rate problems. Although USAC had indicated late last year that disposal of such equipment was acceptable, no FCC rule clearly supported such action. The issue was further complicated by general equipment disposal rules (at least in New York) requiring schools to auction off excess or obsolete equipment for salvage value, if any.

NYSED agrees with the first three principles proposed in the NPRM (i.e., the five-year useful life assumption, applicant declaration of surplus status, and compliance with state and local rules), and concurs with the Commission's conclusion that applicants should not be required to return the discounted portion of any salvage value to USAC. We are concerned, however, with the proposal requiring notification to USAC and the additional five year record retention requirement. We consider such reporting requirements to be unnecessarily burdensome on both the applicants and USAC. We suggest the following two simple reporting requirements:

1. Equipment disposal should be duly noted in an applicant's inventory records.
2. Standard E-rate record retention rules must be observed — i.e., records pertaining to the equipment procurement, installation, and disposal be maintained for a five-year period following the last date to receive service (a date that in many cases would be only slightly beyond, or even before, the actual disposal date).

NYSED notes that at least one of its large applicants has been approached by an equipment vendor offering to dispose of the applicant's obsolete equipment in an ecologically correct manner — free of charge. We ask the Commission to affirmatively indicate that such practices would comply with the E-rate equipment disposal rules and would not constitute a violation of the free services advisory.

Conclusion:

E-rate is a valuable program, not only for the schools and libraries involved, but for the nation as a whole. NYSED commends the Commission and its staff for its diligent efforts to identify and address the vexing issues of E-rate program funding and complexity. As discussed throughout, however, we encourage the Commission not to hastily adopt new rules which, though simple and attractive in concept, would lead to increasingly confusing and burdensome procedures.

Respectfully Submitted by:

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