

**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

Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, DC 20554

**RE: 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 work with schools and libraries, providing a wide range of services, including assistance with application preparation, the processing of payment-related paperwork, and support through the post-commitment auditing process. In addition, we provide a variety of independent consulting services to help companies understand the program's rules and requirements and communicate them within their organizations and to their customers. Our school and library clients include applicants of all sizes, both urban and rural. Our vendor clients include both Fortune 500 companies and start-up companies.

We were privileged to participate in the Commission's May 8, 2003, forum on the E-rate program that addressed issues related to waste, fraud and abuse, and at that time submitted detailed comments that focused on the issues that were the subject of the forum. In addition, one of our principals has served on the Schools and Libraries Division's Task Force on the Prevention of Waste, Fraud and Abuse. Consequently, the comments submitted here will focus on the additional issues raised by the Further Notice of Proposed Rule Making (NPRM) referenced

above, and additional topics that were raised during the course of the Commission's May 8 forum.

First, we wish to commend the Commission for taking affirmative steps to try to improve the program, first by streamlining it and also by addressing concerns related to the potential for waste, fraud and abuse in the program. While, on occasion, we wish that the Commission could move more quickly to implement certain changes, we also appreciate the Commission's concern for giving *all* stakeholder communities the opportunity to make their opinions known on proposed changes and ensuring that certain kinds of rule changes are not implemented on a timetable that could disrupt the application cycle and the financial and technology planning of applicants.

#### **Proposed Unused Funds Carryover Rules**

That said, we were distressed that the Commission has proposed waiting until July 2004, and the start of the 2004 funding year, to carry over undisbursed funds in the program—a process to which it committed itself in mid-2002. We believe that there is no good reason why the SLD could not take the rollover into account as it continues to make funding commitments for the 2003 funding year.

In its NPRM, the Commission proposes that the Universal Service Administrative Company “begin estimating unused funds from the schools and libraries mechanism in 2003.” USAC, has, in fact, been providing quarterly estimates of unused funds for several years. The accuracy of these estimates has enabled the Commission to reduce the contributions that carriers were required to make to the Universal Service Fund over the past year. In its most recent quarterly report, dated May 2, 2003, USAC acknowledged that this change had already taken place:

“Consistent with Section 54.507 of the Commission's rules and the *Schools and Libraries First Report and Order*, the Commission directed that “unused funds from these Schools and Libraries Support Mechanism will be carried forward to increase disbursements to schools and libraries in subsequent quarters.”

Therefore, because USAC is already doing what the Commission proposes in its NPRM, there is no reason why the rollover proposal could not be implemented immediately. In its latest report, based on disbursements that were largely complete for the 2001 funding year and earlier, USAC reported that “\$60 million in Funding Year 1999 funds are available *to carry forward to*

*increase disbursements to schools and libraries in subsequent funding years (emphasis added)*”; \$160.0 million of Funding Year 2000 funds; and \$200.0 million of Funding Year 2001 funds. Although these numbers, at USAC’s own admission, may grow when all of the payment paperwork is completed, at a minimum, an additional \$420 million in funding could be made available for applicants for Funding Year 2003.

According to Funds For Learning’s review of the SLD’s publicly available data, as of July 17, 2003, more than \$643.5 million worth of committed funding had not been disbursed—for the 2001 funding year alone. Because the SLD should have processed most pertinent invoices by now, and knows the dollars at stake in the outstanding appeals, why couldn’t the Commission make these funds available to the SLD when it continues to review internal connections requests for applicants down to the 70 percent discount rate threshold for Funding Year 2003?

Because it is likely, based on previous years’ experience, that USAC will not be able to determine the final threshold for approved Priority Two services for many months, increasing the size of the available funding pool should have no impact on USAC other than to enable it to approve more funding commitments more quickly. The Commission itself noted: “We agree with commenters that receiving funding commitment decisions earlier in the process would help reduce the amount of unused funds.” Thus, making immediate use of the rollover should speed the commitment process and help reduce the disbursement gap that has characterized the program since its start.

The Commission appears to propose delaying use of the rollover until the 2004 Funding Year so that “applicants would have the benefit of three quarterly estimates of unused funds before the filing window closes, and would be able to structure their applications appropriately.” Because applicants are supposed to structure their applications based on their technology plans and their own needs, and not the size of the funding pool, we are concerned that this statement may tend to send the wrong message to applicants. If the Commission is, on the other hand, concerned that demand for the 2003 Funding Year is still somehow distorted by applicants that are inappropriately seeking funding at the 90 percent discount rate, then it should instruct the SLD to address that issue through its standard application review procedures—but let applicants who have already applied in good faith take advantage of the available funding that has already been collected from the carriers. At a time when state and local budget cuts are making it difficult for many schools and libraries to keep their technology plans on track, these dollars could be put

to the use for which they were always intended, rather than simply earning more interest in the USAC bank accounts.

### **Technology Plans**

The Commission proposes changing its rules so that an applicant can indicate that its technology plan will be approved by the time it begins to receive E-rate-eligible services. Because an applicant is not required to specify who approved its technology plan until it files the Form 486, indicating it has begun to receive services, this proposed change would seem to simply bring the rules into conformity with current program practice.

While most states require their public schools and libraries to submit technology plans for approval, we understand from conversations with state leaders that these plans vary widely in quality and specificity. This is particularly true for private schools that may not have access to the same kind of technical assistance that public schools and libraries are able to receive from state agencies.

We believe that the E-rate program should remain grounded in some level of thoughtful technology planning. Further, it is important that this process be driven by schools and libraries themselves, and not by vendors selling particular products. One suggestion for simplifying this requirement would be to ask schools and libraries that are seeking discounts on services beyond basic telephone services to provide a short statement on the Form 471 application, describing what they accomplished with their E-rate discounts in the previous 12 months and what they hope to accomplish in the coming year. We believe it is reasonable to expect that a school or library could briefly explain that it plans “to connect six more schools to the district’s Wide Area Network to improve the district’s administrative practices” or “to provide wireless access to a school, where the costs of wiring would be prohibitive, so that the students there can access the Internet.” If an applicant cannot articulate what it wants to accomplish with its E-rate discounts and, more importantly, what positive impact those improvements will have on its operations, then those discounts should be made available to someone who can.

### **Computerized Eligible Services List**

In previous Notices of Proposed Rule Making and discussions with program stakeholders, we have found there is substantial confusion about what the Commission means by the so-called “Computerized Eligible Services List.” We believe that some stakeholders view this

as a solution for streamlining the application process and making it easier to tie product and service choices made during the application cycle to the products and services that actually appear on invoices.

While that may be a worthy goal, we believe it may be very difficult to implement in practice. We have, however, continued to argue that the Schools and Libraries Division should make available its detailed product eligibility list so that applicants and vendors can know how products will be reviewed, and that it should create a formal process so that vendors can get their products reviewed in an orderly way. Further, we believe that whatever review is done by the USAC invoicing department should complement, not duplicate, reviews that have already been done by the SLD's Program Integrity Assurance department. We have been distressed that in recent months, the invoicing department has become yet another gauntlet that an applicant and its vendors must run—well after a funding request has already been reviewed and approved. If problems have arisen because service substitutions are found to have occurred, then the SLD needs to clarify its standards for when such requests are necessary, and publicly commit itself to an expedited review of them.

Further, we believe that insufficient explanation is being provided to applicants and vendors when an invoice payment is reduced, and that the only way to challenge such a determination is the same lengthy appeals process that is provided to applicants whose initial requests were rejected. At this point in the process, when equipment has been installed or services delivered, the potential impact of a reduced invoice payment on a cash-strapped school or library is much more significant than when the work has not yet begun. We urge the Commission to give additional attention to the impact of these issues on the applicants and vendors who participate in the program.

The overriding goal of the SLD should be to provide information to applicants and vendors in a transparent way that can help them submit their applications correctly, not to apply rules inconsistently and in a manner that only serves to punish applicants because the rules and standards could not be explained clearly to those program stakeholders who had to follow them.

### **Debarment Procedures**

We believe that it is appropriate for the Commission to debar persons or entities that willfully and repeatedly violate program rules. We also believe that it is important for the

Commission to develop procedures that will give program stakeholders “early warning” of the suspected rule violations. Any process that is developed should be a swift one, so that unsuspecting applicants will be protected from doing business with “bad actor” vendors. By the same token, vendors’ marketing activities should not be disrupted if they are, indeed, innocent. Unfortunately, in a climate in which there is heightened concern about the potential for waste, fraud and abuse, a well-timed call to the SLD’s Whistleblower Hotline can amount, in some cases, to a competitive tactic rather than a tool in the fight against fraud.

We have observed that many aspects of the E-rate program require, in effect, “two to tango.” A vendor may not be able to defraud the program if it cannot find inexperienced applicants that do not understand the rules. Similarly, applicants with strong competitive bidding procedures in place and ethical staff members on the job are less likely to be taken in by companies selling products at outlandish prices. Thus, we believe that in cases where an applicant’s service provider has been debarred after its application has been submitted, the SLD should first determine whether the applicant knew or should have known of the activities involved, or failed to live up to its own responsibilities under program rules, before permitting the applicant to change service providers and proceed with the projects. In some cases, these lessons may be very painful for the parties involved, but the result will be to improve overall program integrity.

We believe that access to E-rate funding is a privilege, not a right. Applicants who do not understand the program’s fundamental rules increase the compliance responsibilities of the SLD and cause problems for all program stakeholders by undermining policymakers’ support for the program. We believe that many of these mistakes are innocent ones, and thus not the kind that should lead to debarment from the program. However, we believe in that in some cases that do not involve outright fraud, it *is* reasonable to require that applicants who are found to have violated the most basic program rules be required to complete an SLD training session, either online or by correspondence, before they can apply again. This training would cover such important topics as the SLD’s standards for competitive bidding procedures and the requirement that applicants must pay their portion of the cost of the services they wish to order. While some stakeholders may view this idea as too burdensome, we believe it is an appropriate requirement for those who have not understood the program’s basic rules while seeking access to substantial amounts of funding.

## **Preparing for the 2004 Application Year**

Before the start of the Form 471 filing window for the 2004 funding year, we believe that the Commission should take these steps:

- Issue a rule that E-rate-eligible equipment must be kept in place for at least three years unless a waiver of the rule is approved by the SLD. Although we support additional proposals to adjust the discount matrix and to impose a ceiling on funding commitments, we believe that the Commission will not be able to implement these proposals in time for the 2004 filing season. However, we recommend that the Commission make clear that it did not intend school districts to purchase the same equipment year after year for their 90 percent schools as a way of funneling discounts for internal connections to the rest of the school district. An E-rate service provider recently told us that this was the only way some districts could make use of E-rate discounts because, “for political reasons,” a district has to make sure that it could eventually provide services to all of its schools, no matter the discount rate. (Such a school district apparently does not appreciate that its actions are, in effect, denying discounts to districts with schools that are equally needy but that do not have a 90 percent school through which the payments can be funneled.) Adopting a limit on transferability now will help curb abuses like these while the Commission pursues other strategies that should help the program achieve its policy goals by eliminating market distortions.
- Provide additional clarification on how broadly the SLD is supposed to apply the Commission’s new “educational purposes” definition to specific kinds of hardware and services so that applicants can correctly prepare their applications for 2004. It is imperative that this determination be made in advance of the 2004 filing season, not in the middle of application review.
- Provide additional clarification on whether voice mail will be treated like e-mail under Priority 2 services—as we believe it should be—so that vendors can

correctly reflect the Commission's position in their marketing materials and so that applicants can correctly prepare their 2004 applications.

- Provide additional clarification on how the new prohibition on "duplicative services" will be applied. In the short time since the Commission's final rule was announced in April 2003, this has already created confusion over the extent to which the Commission intended this rule to be applied.
- Instruct the SLD to move quickly to put in place a process through which applicants can obtain relief when a vendor has failed to convey a BEAR check to an applicant within the new 20-day deadline.

Further, we encourage the Commission to pay close attention to the forthcoming recommendations of the SLD's Task Force on the Prevention of Waste, Fraud and Abuse. Having observed this process at close hand, we believe that it will lead to many practical recommendations on which stakeholders from all sides of the program can agree. Because the task force's membership is a diverse one, we believe that this group's consensus recommendations will provide the kind of middle-ground solutions that should be easy for the Commission to adopt.

We also recommend that the Commission encourage the SLD to create an ongoing "advisory group" of stakeholders who represent multiple points of view within the program. This group could serve as an effective sounding board on which the SLD and Commission could test ideas and policies to determine how they are likely to work in practice. Although the SLD already has opened lines of communication to several specific stakeholder groups, the strength of the Task Force on the Prevention of Waste, Fraud and Abuse, we believe, has been its ability to review issues from multiple perspectives and to consider how proposed policies will impact different kinds of applicants and vendors. We believe its ultimate recommendations, will, as a result, gain substantial support throughout the E-rate community.

In summary, we commend the Commission for its continued strong support for the schools and libraries support mechanism and its ongoing efforts to improve the E-rate program and its implementation. As we were preparing to submit these comments, the Schools and Libraries Committee of the USAC's Board of Directors approved a budget increase to enable the

SLD's subcontractors to hire more permanent employees and to, in effect, "professionalize" application review to a greater degree than in the past. While some stakeholders may be concerned about the cost associated with taking these steps, we believe they will prove to be very cost-effective for the overall program, enabling schools and libraries to be able to actually use more of their approved discounts by getting them into their hands more quickly, generating fewer appeals of incorrect decisions and decreasing the number of additional steps that must be taken on the back end (e.g., deadline extensions and service substitution requests) when funding commitments are delayed. We are encouraged by this budgeting decision and anticipate that the Commission and USAC will continue to take many more positive steps in the coming weeks and months to improve the program and its operations.

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