

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

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

**COMMENTS OF THE AMERICAN LIBRARY ASSOCIATION
IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING (FCC 09-96)**

The American Library Association (ALA), the world’s oldest and largest professional library association, is pleased to provide comments on this Notice of Proposed Rulemaking which proposes a new rule for schools as a result of the Protecting Children in the 21st Century Act and rule revisions for schools and libraries to “reflect existing statutory language [of the Children’s Internet Protection Act] more accurately.” The proposed rule and rule revisions impact the Federal Communications Commission’s (FCC) schools and libraries universal service support mechanism also known as the E-rate program.

Thanks to the E-rate program, thousands of public libraries have applied for and received discounts on basic telecommunications and information services, and thousands more have benefited from access to advanced telecommunications services through broadband capacities made available through the program. At the same time, we have documented that the requirements of the Children’s Internet Protection Act have had a chilling effect on library participation in the E-rate program. We believe that the additional burden caused by the proposed rule revisions and the proposed timing for implementation will further negatively impact library participation in the E-rate program. These funds are critical in meeting the ongoing and evolving needs of libraries as they serve the growing needs of their communities. The proposed rule revisions seem unwarranted given that, with the exception of the added language in the Protecting Children in the 21st Century Act, there have been no other statutory changes to the Children’s Internet Protection Act since its enactment in 2000. We also note that the current legal certifications required of E-rate recipients on FCC Forms 479 and 486 cite the relevant sections of the law—not the rules—and therefore rule revisions causing confusion and added burden seem not only unwarranted but counter-productive and redundant.

Many of the rule revisions posed here were given careful consideration in the Commission’s First CIPA Order.¹ We are not aware of issues that would cause the need for the revisions being proposed now—nine years after the initial CIPA comment period and resulting Order.

¹ FCC 01-120

Comment Format

For your convenience, our comments on the Commission's proposed rule and rule revisions are listed below each tentative conclusion or request for comment.

Protecting Children in the 21st Century Act Rule Revisions

NPRM Section (III)(A)(4):

4. We seek comment on revising section 54.520(c)(i) of the Commission's rules to include the new certification requirement added by the Protecting Children in the 21st Century Act. We propose to revise section 54.520(c)(i) to add a certification provision that a school's Internet safety policy must include educating minors about appropriate online behavior, including interacting with other individuals on social networking websites and in chat rooms and cyberbullying awareness and response. We seek comment on this proposal.

With regard to the Commission's request for comment on revising "section 54.520(c)(i) of the Commission's rules to include the new certification requirement added by the Protecting Children in the 21st Century Act, we respectfully note that it is section 54.520(c)(1)(i) [bold emphasis added]—not section 54.520(c)(i)—that addresses certification requirements for schools and section 54.520(c)(2)(i) that addresses certification requirements for libraries. It is our understanding, therefore, that the rule related to the statutory requirement in Section 215 of the Protecting Children in the 21st Century Act for "Promoting Online Safety In Schools" will be added only to section 54.520(c)(1)(i) as correctly identified in the proposed rule in Appendix A.

NPRM Section (III)(A)(5):

5. In addition, we tentatively conclude that a recipient of E-rate funding for Internet access and internal connections should be required to certify, on its FCC Form 486 for funding year 2010, that it has updated its Internet safety policy to include plans for educating minors about appropriate online behavior, including interacting with other individuals on social networking websites and in chat rooms and cyberbullying awareness and response, as required by the Protecting Children in the 21st Century Act. We note that the next opportunity for applicants to certify to the CIPA requirements, including this new certification, would be on the FCC Form 486 for funding year 2009, which would typically be filed after the start of the 2009 funding year (i.e., after July 1, 2009). Schools may, however, require additional time to amend their Internet safety policies and implement procedures to comply with the new requirements after the completion of this rulemaking proceeding. In addition, we note that Congress did not set a timeframe for implementation of the new certification. We seek comment on this tentative conclusion.

With regard to the Commission's tentative conclusion above that "a recipient of E-rate funding for Internet access and internal connections should be required to certify, on its FCC Form 486 for funding year 2010, that it has updated its Internet safety policy...", we note that in the context of the Protecting Children in the 21st Century Act and the corresponding changes to 47 U.S.C. § 254(h)(5)(B), (the "CIPA section" of the law for schools), it is likely not "a recipient" of E-rate

funding that must certify as to updates to their Internet safety policy to include plans for educating minors, but rather it is likely the Administrative Authority for the school recipient of E-rate funding that must do so—either on the Form 479 (if they are the Administrative Authority for the school recipient of service but not the Billed Entity Applicant), or on the Form 486 if they are a Billed Entity who is also the Administrative Authority for the purpose of making the certification. We note that the Commission’s description above suggests that the certifications from school “recipients” would be required on the Form 486. Currently, that would not be possible since, it is the Billed Entity that makes certifications on the Form 486.

While the FCC has proposed the relevant rule change in Appendix A of the NPRM, we do not see a proposed corresponding certification. We wish to make clear that since the Commission has indicated that a [school] recipient “should be required to certify on its FCC Form 486...,” it will be essential that any form changes—either to the FCC Form 479 or Form 486—differentiate which certifications are required to be made by the Administrative Authority for school recipients of service and those certifications that are required to be made by the Administrative Authority for library recipients of service. Again, since the Form 486 is filed by the Billed Entity who may or may not also be the Administrative Authority for the school recipient of service, it is our understanding that the related certification will be needed on both FCC Forms 479 and 486 in order to comply with the processes established by the Commission for section 254 certifications.

However, rather than slowing or interrupting the E-rate funding process due to changes to both FCC Forms 479 and 486, corresponding instructions, and online forms—not to mention delays that may be caused should OMB approval for the changes be required—may we respectfully suggest that rather than adopting the proposal by the Commission that “a recipient of E-rate funding for Internet access and internal connections should be required to certify, on its FCC Form 486...that it has updated its Internet safety policy to include plans for educating minors about appropriate online behavior, including interacting with other individuals on social networking websites and in chat rooms and cyberbullying awareness and response...” that the Commission rely on the existing certification language on both FCC Forms 479 and 486 that “the recipients of service have complied with the requirements of the Children’s Internet Protection Act, as codified at 47U.S.C. § 254(h) and (l)?”

In this same section of the NPRM, the Commission indicates that “the next opportunity for applicants to certify to the CIPA requirements, including this new certification, would be on the FCC Form 486 for funding year 2009, which would typically be filed after the start of the 2009 funding year (i.e., after July 1, 2009)” and asks for comments on this tentative conclusion.

First, by the end of this reply comment period, Funding Year 2009 (July 1, 2009 through June 30, 2010) will be eight months into the funding year. Many entities are long past the latter of either the 120-day deadline after the Service Start Date or after the Funding Commitment Decision Letter date for timely filing Form 486 to receive discounts retroactively to the Service Start Date. Therefore, implementing such a requirement for Funding Year 2009 is not only burdensome and impractical since payments have already been disbursed, but disingenuous if schools were to be asked to re-sign certifications related to policies for which a rule (and therefore a revised Internet safety policy) did not yet exist when authorizations to pay the service provider were made.

Further, the FCC’s NPRM does not acknowledge the current requirement for the filing of the FCC Form 479 by those Administrative Authorities who are not also the billed entity applicant such that

the certifications are properly completed by the billed entity when filing the Form 486. Given that the billed entity certifies that it has “collected duly completed and signed” Forms 479 before completing the Form 486, consideration must also be given to the timing related to the collection of the Form 479 prior to the completion and submission of the Form 486. In many cases, and especially for large consortium-type applications, the FCC Forms 479 are collected **before** the filing of the Form 471 to ensure that recipients of service who are to be listed on Block 4 of the Form 471 are CIPA compliant before funds are requested on their behalf. As a practical matter, and to reduce further burden on recipients of service, many billed entities choose to collect Letters of Agency (LOA) and Forms 479 at the same time. Because, as noted, this is very often done before filing Form 471 to ensure accurate inclusion of entities eligible to receive funding and therefore accurate discounts, the period for collection of the Form 479 can begin as early as July and run up through the window close which is typically during the following February. Given this practical reality, implementation for either Funding Year 2009 or for Funding Year 2010 would mean that thousands of entities would have to re-file their Forms 479 with the Billed Entity Applicant. Making contact yet again with each of those thousands of recipients of service and recollecting Forms 479 to obtain new certifications is an unreasonable request. The earliest that implementation of the Protecting Children in the 21st Century Act could reasonably be expected is for Funding Year 2011. Even Funding Year 2011 implementation assumes that any necessary changes to forms and instructions could be made on or around July 1, 2010 when many large consortium-type applicants may begin the LOA and Form 479 collection process for Funding Year 2011. In addition, such a change would also impact the on-line forms requiring additional programming work by the fund Administrator.

Proposed Rule Revisions Beyond the Requirements of the Protecting Children in the 21st Century Act

NPRM Section (III)(B)(6):

6. We also seek comment on revising certain rules to reflect more accurately existing statutory language regarding the CIPA certifications.

We question the cost benefit of changing rules simply to “reflect existing statutory language more accurately.” As you will see from the remainder of our comments, we believe the proposed changes may also cause significant confusion. We do not believe that the benefit that may occur as a result of the proposed rule revisions outweighs the consideration that must be given to the burden associated with multiple form changes, instruction changes, the need to obtain OMB approval for those changes, the need to recollect forms, and the need for retraining thousands of applicants. The FCC acknowledges that this is not about accurate language—but rather is for the purpose of “more accurate” language. We recognize that the FCC is likely looking to “tweak” rules in order to ensure that they can enforce repayment due to non-compliance—but at what price to applicants, the fund Administrator, and ultimately to the program? Is the Commission aware of such significant CIPA violations that it is worth the cost associated with making these changes? The aggregate cost of postage alone in asking recipients of service to re-file Forms 479 already submitted—either for Funding Year 2009 or for Funding Year 2010—will be considerable not to mention the fact that obtaining them a second time will require untold amounts of follow up to ensure their receipt.

Non-response from those entities that have already been identified on Forms 471 as a result of previous forms collection would also impact discount calculations.

Unlike other FCC forms used in the E-rate program that rely more heavily on rule citations, both Forms 479 and 486 rely heavily on statutory citations. Those statutory citations are also linked to the certification requirements in the rules at 54.520(c)(1) and (c)(2). With regard to the need for the Commission to be able to seek repayment in the case of identified non-compliance with the statute, we note that both FCC Forms 479 and 486 adequately notify applicants of the consequences (fine, forfeiture and/or imprisonment) of making false claims. In addition, the Commission in its January 16, 2009 letter to USAC² acknowledges in Table C that certain situations related to CIPA compliance may not even warrant recovery.

Not only are the proposed changes not significant enough to warrant both the burden and the confusion to applicants; in some cases, the proposed “clarifications” are anything but. The proposed revisions are, in our opinion, without any substantive value. We urge the Commission to rethink the consequences of their proposed revisions. Predictability and sustainability are key components of the E-rate program. Putting the program on hold and adding confusion to the already complex program is unthinkable at a time when the public is so heavily relying on schools and libraries that depend on E-rate discounts for critical services.

NPRM Section (III)(B)(7):

First, we propose to revise the rules so that the definitions of elementary and secondary schools are consistent throughout. At this time, rule sections 54.500, 54.501, and 54.504 all contain differently worded definitions of elementary and secondary schools. We propose to define elementary and secondary schools in section 54.500 of the rules, and to revise sections 54.501 and 54.504 to refer to section 54.500 definitions. We seek comment on this proposal.

Elementary and secondary schools are defined by the Elementary and Secondary Education Act (20 U.S.C. § 7801 (18) and (38)) respectively. The three sections cited above have different purposes. Only Section 54.500 is for the purpose of terms and definitions. The proposed revisions actually create confusion based on the multiple phrases used. Ideally, the Commission would not make any changes to these sections given the ripple effect through Forms and instructions that would also be required—especially if it is not the intent to change the meaning of the terms. If the FCC feels compelled to make changes, we would recommend that the FCC simply repeat the *precise language* contained in 20 U.S.C. or cite the statute if there are concerns about potential definitional changes over time. See below:

§ 7801 TITLE 20—EDUCATION Page 1328

(18) Elementary school

The term “elementary school” means a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law.

² http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-86A1.doc

(38) Secondary school

The term “secondary school” means a nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education, as determined under State law, except that the term does not include any education beyond grade 12.

(c) *Elementary school.* ~~An~~ [The term] “elementary school” means an elementary school as defined in 20 U.S.C. § 7801(18). ~~, a non-profit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under state law.~~

(k) *Secondary school.* ~~A~~ [The term] “secondary school” means a secondary school as defined in 20 U.S.C. § 7801(38). ~~, a non-profit institutional day or residential school that provides secondary education, as determined under state law. A secondary school does not offer education beyond grade 12.~~

Again, not only are the proposed changes for these three sections without substance, but the confusion that will arise as to the impact of the changes on eligibility—for the first time in the twelve-year history of the program—will cause worse problems than leaving the “definitions” in the definition section –54.500; the eligibility requirements in the eligibility section –54.501; and the certification for ordering services in the Request for Service section –54.504. We also point to the additional confusion that is caused during audits in terms of questions associated with the year in which rules are applicable. In addition, given the need of applicants and others to review previous FCC Orders which cite these sections, further work will be required to determine the applicability of the rules to those previous Orders.

NPRM Section (III)(B)(8):

8. Second, we propose to revise section 54.520(a)(1) to add “school board” to the definition of entities that are subject to CIPA certifications. Although section 254(h) of the Act includes the term “school board” as an entity to which the CIPA certifications apply, our rules do not include this term. We seek comment on this proposal.

If the FCC is looking to “mirror” language with the Act, then the words “school district” should be removed when adding the words “school board.” However, the proposal to add the words “school board” seems like a change with no substance given that both the statutory and existing rule language says “or other authority responsible for administration of a school.” Clearly, such language could include school boards. We do not believe that changes to mirror language with that of the Act has any substantive impact. Given that the purpose of the language is to identify possible “administrative authorit[ies]” responsible for making certifications on either the Form 479 or Form 486, and given that the “responsible for administration of a school” language is included in the existing rule and that the statute is cited on the FCC Forms 479 and 486, it certainly seems needless to make such a revision. It is also important to note that even if the school board language is added, it does not mean that school boards would uniformly be the administrative authority to actually sign

certifications for schools. More often, that administrative authority resides with the school district—the current language of the rule. The issue of actual administrative authority is the key issue related to making the relevant certifications required—not the identification in a rule as to whom that administrative authority may be.

NPRM Section (III)(B)(9):

9. Third, we propose to revise section 54.520(a)(4) to add the existing statutory definitions of the terms “minor,” “obscene,” “child pornography,” “harmful to minors,” “sexual act,” “sexual contact,” and “technology protection measure,” consistent with the statute. Section 54.520 of our rules does not currently include the definitions of these terms, but instead refers back to the statute. Including the statutory definitions of these terms in the definitions section of our rules could help clarify the CIPA requirements. We seek comment on this proposal.

Again, we see this as a change with little value since the proposed rule change still refers back to the statute—just a different one. Rather than referring to § 1721(c) of the CIPA Act, as is currently the case in §54.520(a)(4), the references are now to 18 USC § 1460, 2256, and 2246.

We also note that spelling out the definition for the term “minor,” as is the case in the proposed rule change, will once again cause additional confusion—confusion that was addressed at the time of training related to the initial CIPA Order seven years ago in preparation for CIPA compliance in Funding Year 2004. The definition of “minor” varies from state to state as it relates to state internet use laws and therefore can be more stringent than this definition. Again, the burden caused by having to make these clarifications all over again just adds burden to staff who are already facing work overloads due to layoffs and other budget cuts.

NPRM Section (III)(B)(10):

10. Fourth, we propose to revise sections 54.520(c)(1)(i) and 54.520(c)(2)(i) consistent with sections 254(h)(5)(D), (h)(6)(D), (h)(5)(B)(ii), (C)(ii), and (h)(6)(B)(ii), (C)(ii) of the Act to require that the technology protection measures be in operation during any use of computers with Internet access, and that the technology protection measures may be disabled by an authorized person, during adult use, to enable access for bona fide use research of other lawful purpose. The statute requires that schools and libraries certify that they are enforcing the operation of the technology protection measures during the use of computers by minors and adults. This enforcement requirement is not currently included in the Commission’s rules. We seek comment on this proposal.

First, and most importantly, we respectfully point out that the Act does not say, as indicated above, that “technology protection measures must be in operation during **any use of computers with Internet access** [emphasis added]...” As the FCC has pointed out on many occasions, the Act at (h)(B)(5)(B)(i) and (h)(B)(5)(C)(i) for schools and at (h)(B)(6)(B)(i) and at (h)(B)(6)(C)(i) for libraries says that the school or library must be “enforcing... the operation of a technology protection measure with respect to any of **its computers** [emphasis added] with Internet access.” Requiring an administrative authority to be responsible for other than the computers owned by the respective

school or library goes well beyond the requirement of the Act. While we believe this “enforcement” language is unnecessary for the reasons further identified below, should the FCC feel compelled to move forward with these proposed rules, we offer the following change below, noted in brackets and bold face type, to the proposed rules in Appendix B such that the rules are consistent with the Act.

(c)(1)(i). The Internet safety policy adopted and enforced pursuant to 47 U.S.C. 254(h) must include a technology protection measure that protects against Internet access by both adults and minors to visual depictions that are obscene, child pornography, or, with respect to use of the computers by minors, harmful to minors. The technology protection measure must be enforced during use of **[its]** computers with Internet access, although an administrator, supervisor, or other person authorized by the certifying authority under subparagraph (c)(1) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose. This Internet safety policy must also include monitoring the online activities of minors and must educate minors about appropriate online behavior, including interacting with other individuals on social networking websites and in chat rooms and cyberbullying awareness and response.

(c)(2)(i). The Internet safety policy adopted and enforced pursuant to 47 U.S.C. 254(h) must include a technology protection measure that protects against Internet access by both adults and minors to visual depictions that are obscene, child pornography, or, with respect to use of the computers by minors, harmful to minors. The technology protection measure must be enforced during use of **[its]** computers with Internet access, although an administrator, supervisor, or other person authorized by the certifying authority under subparagraph (c)(1) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.

Second, unlike other FCC Forms which cite Commission rules, the legal certifications on Forms 479 and 486 cite sections 254(h) and 254(l) of the Act. Applicants are notified of the ramifications of making false statements and therefore “clarifications” to the rules for the purpose of enforcing disabling compliance or seeking repayment of funds are unnecessary:

Given that the Act is clear in both 254(h)(5)(D) and (h)(6)(D) that a person authorized by the certifying authority “may disable,” it is recognized that the technology protection measure must be “enabled” before it can be “disabled” as follows:

“(D) Disabling during adult use

An administrator, supervisor, or other person authorized by the certifying authority under subparagraph (A)(i) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.”

Since the Administrative Authority, either on the Form 479 or Form 486, as appropriate, certifies as to their compliance with 47U.S.C. §254(h) and (l), including the enforcement of requests for disabling a technology protection measure see no reason for rule revisions related to this matter.

NPRM Section (III)(B)(11):

11. In addition, sections 254(h)(5)(D) and (h)(6)(D) of the Act permit a school or library administrator, supervisor, or other person authorized by the certifying authority to disable an entity’s technology protection measure to allow bona fide research or other lawful use by an adult. We note that in the *CIPA Order*, although the Commission acknowledged this statutory provision, it declined to adopt any implementing rule provision, stating that

[w]e decline to promulgate rules mandating how entities should implement these provisions. Federally-imposed rules directing school and library staff when to disable technology protection measures would likely be overbroad and imprecise, potentially chilling speech, or otherwise confusing schools and libraries about the requirements of the statute. We leave such determinations to local communities, whom we believe to be most knowledgeable about the varying circumstances of schools or libraries within those communities.

The Commission stated that its decision was supported by commenter concerns about the difficulty of school or library staff in determining whether an adult user was engaging only in bona fide research or other lawful purposes.

NPRM Section (III)(B)(12):

12. We propose to revise the rules to codify this permission that a school or library administrator, supervisor, or other person authorized by the certifying authority may disable an entity’s technology protection measure, during use by an adult, to allow bona fide research or other lawful use. We do not propose to adopt rules that mandate specific implementation methods, but merely mirror the statutory language. This will make clear that the statutory provision exists without imposing undue burdens on the entities to which it applies. We seek comment on whether it is sufficient to adopt this rule without specifying federal guidelines for determination of what constitutes bona fide research or other lawful use. We seek comment on whether this statutory provision imposes an undue burden on Erate beneficiaries, particularly on small entities, and if so, we seek comment on the least burdensome method of implementing this provision. For example, we note that the *CIPA Order* discussed leaving these determinations to local communities because they would be most knowledgeable about the varying circumstances of schools or libraries within those communities. We believe that our proposed rules are consistent with that position. We also seek comment on any other methods of implementing this statutory provision.

First, in the absence of a specific proposed rule, we point out that the language above does not precisely mirror the statutory language. We note the following: 1.) It is an administrator, supervisor, or other person authorized by the certifying authority who may disable (not necessarily a school or library administrator, etc.), and 2.) The statute uses the term “lawful purpose” rather than “lawful use.”

Second, we once again point to the fact that the statute is clear on this matter and that the certifications cite the statute not the rules.

Third, we support the Commission's earlier conclusion in the First CIPA Order (FCC 01-120) that:

“Federally-imposed rules directing school and library staff when to disable technology protection measures would likely be overbroad and imprecise, potentially chilling speech, or otherwise confusing schools and libraries about the requirements of the statute. We leave such determinations to the local communities, whom we believe to be most knowledgeable about the varying circumstances of schools or libraries within those communities.”

Fourth, and most importantly, we remind the Commission that its later CIPA Order (FCC 03-188) issued subsequent to the Supreme Court decision on the constitutionality of Section 254(h)(6), notes at paragraph 9 that:

“On June 23, 2003, the Supreme Court issued its opinion reversing the judgment of the District Court and finding that CIPA, on its face, is constitutional. The Supreme Court found that CIPA does not induce libraries to violate the Constitution because public libraries' Internet filtering software can be disabled at the request of any adult user and, therefore, does not violate their patrons' First Amendment rights.³ In upholding CIPA, the Supreme Court emphasized “the ease with which patrons may have the filtering software disabled,” and that a patron who encounters a blocked site ... need only ask a librarian to unblock it (or at least in the case of adults) disable the filter.”⁴ The plurality also highlighted the government's acknowledgment at oral argument that “a patron would not ‘have to explain ... why he was asking a site to be unblocked or the filtering to be disabled.’”⁵ Pursuant to Supreme Court rules, the decision in *U.S. v. American Library Association* will become effective no earlier than July 18, 2003.⁶

Given the acknowledgement by the Supreme Court that an adult “patron would not have to explain...why he was asking a site to be unblocked or the filtering to be disabled,” it is clear that any attempt to specify federal guidelines for determination of what constitutes bona fide research or other lawful purpose for the purpose of disabling technology protection measures would be inconsistent with the Supreme Court's decision.

³ *United States v. American Library Ass'n*, 2003 WL 21433656 at *8. See also *id.* at *11 (Kennedy, J., concurring), at *14 (Breyer, J., concurring).

⁴ *United States v. American Library Ass'n*, 2003 WL 21433656 at *8 (plurality opinion). See also *id.* at *11 (Kennedy, J., concurring), at *14 (Breyer, J., concurring). *United States v. American Library Ass'n*, 2003 WL 21433656 at *8 (plurality opinion). See also *id.* at *12 (Breyer, J., concurring) (“As the plurality points out, the Act allows libraries to permit any adult patron access to an ‘overblocked’ Web site; the adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, ‘Please disable the entire filter.’”); *id.* at *10 (Kennedy, J., concurring) (underscoring the government's representation that “on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay”).

⁵ *Id.* at *8 (quoting Tr. Of Oral Arg. 4).

⁶ Under the Supreme Court's rules, its decisions do not become effective until the Court sends a certified copy of the judgment to the lower court. The Court does not send the certified copy until at least 25 days after the entry of judgment. Sup. Ct. R. 45.

NPRM Section (III)(B)(13):

13. Fifth, we propose to revise sections 54.520(c)(1)(iii)(B), (2)(iii)(B), and (3)(i)(B) to clarify that it is only in the first year of participation in the E-rate program that an entity may certify that it will complete all CIPA requirements by the next funding year and still receive funding for that year, as adopted in the *CIPA Order*. The text of the existing rules contains an option for an entity to certify that it will come into compliance with the CIPA requirements by the next funding year, but does not specify that this certification option is only applicable to entities that are applying for E-rate discounts for the first time. We seek comment on this proposal.

The Commission expresses concern that the existing rules do not specify that the certification regarding the option for an entity to come into compliance by the next funding year is only applicable to those “applying” for E-rate discounts for the first time. Yet, the proposed rule does not make clear what “applying” means as it relates to establishing the first and second funding years for the purpose of CIPA.

We call to the Commission’s attention that in their own CIPA Order (FCC 01-120), makes clear in paragraph 13 that

“...Congress provided that, for Funding Year 4 or any other year that is the first year after the effective date of section 254(h) in which an entity applies for universal service discounts, entities that do not have the Internet safety policy and technology protection measures of section 254(h) in place shall certify that they are “undertaking such actions, including any necessary procurement procedures, to put in place” the required policy and measures. Entities making this certification need not have the required policy and measures in place until the subsequent year.

And in paragraph 18 that

“...in Funding Year 4, or any other year that is the first year in which an entity applies for universal service discounts, entities that have not adopted and implemented the Internet safety policy required by section 254(l) shall certify that they are “undertaking such actions, including any necessary procurement procedures, to put in place” the required policy. Entities making this certification are not required to adopt and implement the required policy until the subsequent year.”

In paragraph 20, the Commission

“direct[s] that certifications in Funding Year 4 and subsequent funding years be made on a modified FCC Form 486 (“Receipt of Service Confirmation Form”).”

In paragraph 70, the Commission further describes the point at which “applies” occurs given that CIPA requires certifications by recipients.

“In reaching this conclusion the Commission also considered, as an alternative, adding the certification language to the existing FCC Form 471. However, the Form 471 is submitted by applicants for universal service discounts, whereas CIPA requires certifications by

recipients. Furthermore, entities completing Form 471 are not assured of receiving discounted funds, and consequently might not become subject to CIPA requirements. Therefore we have concluded that Form 486, which is completed only by recipients of services, is more appropriate for CIPA certifications by recipients. Recipients will know by the time they submit the modified Form 486 that they will receive discounts, which is not the case at the time of Form 471 submission. By certifying on Form 486, recipients will only have to certify as to CIPA compliance once they are certain of receiving discounted services.”

The proposed rules are less than clear as to when the first and second year occur for the purpose of establishing the period in which recipients can “undertake actions” or must be fully compliant with the requirements of CIPA. Given that the term “applies” is generally associated with the filing of the Form 471 and could therefore be considered inconsistent with the Commission’s CIPA Order and the current instructions for determining the first and second year for the purposes of CIPA, we once again suggest that the proposed rule “clarifications” could instead cause greater confusion.

The Form 486 Instructions go to great lengths to explain the “first year” and “second year” for the purpose of CIPA consistent with paragraph 70 of the CIPA Order as noted above. We believe that these requirements have been made clear in the FCC Form 486 instructions as evidenced below and as have been implemented for the last seven years. We strongly urge the Commission not to impose new rules that, in their limited form, will likely confuse applicants as to how to determine the “first year” and “second year” for the purpose of CIPA.

From the FCC Form 486 instructions:

Applying for Funds: For the purpose of CIPA requirements, a school or library that is a recipient of service is considered to have applied for funds in a Funding Year after a Form 486 is successfully data entered and USAC issues a Form 486 Notification Letter featuring an FRN for Internet Access, Internal Connections or Basic Maintenance.

Determination of Your First Funding Year for Purposes of CIPA: The first Funding Year after Funding Year 2000 (the Funding Year beginning July 1, 2000) in which a school or library applies for funds (i.e., in which a Form 486 is successfully data entered for Internet Access, Internal Connections or Basic Maintenance and USAC issues a Form 486 Notification Letter) is your **First Funding Year** for purposes of CIPA. Once your First Funding Year is established, the next two funding years will be your second and third funding years for purposes of CIPA. (See “Applying for Funds” above.) In your first Funding Year, you must be in compliance with CIPA or undertaking actions to comply with CIPA, in order to receive discounts for Internet Access, Internal Connections or Basic Maintenance services.

Once your First Funding Year is established, the Funding Year immediately following the First Funding Year becomes your **Second Funding Year** for purposes of CIPA. If the school or library applies for funds for Internet Access, Internal Connections or Basic Maintenance in the Second Funding Year, it must certify that it is in compliance with CIPA unless state or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required. A school or library so prevented may request a waiver for the Second Funding Year. (See the instructions for Item 6c.)

Your **Third Funding Year** for purposes of CIPA is the Funding Year immediately following your Second Funding Year. If the school or library applies for funds for Internet Access, Internal Connections or Basic Maintenance in the Third Funding Year, it must be in compliance with CIPA.

You must be in compliance with CIPA for any Funding Year thereafter.

The following situations WOULD constitute the Administrative Authority's First Funding Year:

- The Billed Entity submits a Form 486 for Internet Access, Internal Connections or Basic Maintenance, the Form 486 is successfully data entered and USAC issues a Form 486 Notification Letter, but the Billed Entity cancels all of its FRNs on a Form 500.
- The Billed Entity submits a Form 486 for Internet Access, Internal Connections or Basic Maintenance, the Form 486 is successfully data entered and USAC issues a Form 486 Notification Letter, but the Service Provider does not receive a corresponding disbursement.

The following situations WOULD NOT constitute the Administrative Authority's First Funding Year:

- The Billed Entity receives a Funding Commitment for Internet Access, Internal Connections or Basic Maintenance, but takes no further action.
- The Billed Entity receives a Funding Commitment for Internet Access, Internal Connections or Basic Maintenance, submits Form 486, but the Form 486 is not successfully data entered and no Form 486 Notification Letter is issued.
- The Billed Entity applies only for Telecommunications Services.

As you can see, the explanation is detailed due to the questions that arise in determining what “apply” means. Revisions to a rule will likely cause new concerns, new questions, and new requirements for training and/or assistance.

NPRM Section (III)(B)(14):

14. Sixth, we propose to add a rule provision to require local determination of what matter is inappropriate for minors. Among other things, the statute states that a determination regarding what matter is inappropriate for minors shall be made by the school board, local educational agency, library or other authority responsible for making the determination. Although this is mandated by the statute, it is not currently in the Commission's rules. We seek comment on this proposal. We also seek comment on whether this requirement will be burdensome, particularly for small entities. If so, we seek comment on how to reduce this statutorily mandated burden.

While the statute does indicate in Section 254(l)(2) that a determination regarding what matter is inappropriate for minors shall be made by the school board, local educational agency, library, or other authority responsible for making the determination, it should be further noted in this discussion that the same section of the statute further states that:

“No agency or instrumentality of the United States Government may—

- (A) establish criteria for making such determination;
- (B) review the determination made by the certifying school, school board, local educational agency, library, or other authority; or
- (C) consider the criteria employed by the certifying school, school board, local educational agency, library, or other authority in the administration of subsection (h)(1)(B) of this section.”

Given that the statute is clear as to the limitations on the establishment, review, or consideration of the criteria employed by the Administrative Authority, we believe that the establishment of a new

rule requiring local determination of what matter is inappropriate for minors has little value. We believe it is reasonable to assume that an Administrative Authority, in giving reasonable public notice and conducting a hearing or meeting to address its proposed policy of Internet safety, will have addressed the issue of inappropriate matter. Anything further imposed seems unnecessarily burdensome, particularly on small entities that have already been required to prepare an Internet safety policy.

NPRM Section (III)(B)(15):

15. Seventh, we propose to add a rule provision requiring each Internet safety policy that is adopted pursuant to section 254(l) of the Act to be made available to the Commission upon request by the Commission. Although this requirement is mandated by the statute, it is not currently in the Commission's rules. We seek comment on this proposal. We also seek comment on the manner in which the Internet safety policy should be made available to the Commission and on the timing of such response. We also seek comment on the burdens that this requirement may impose on respondents, particularly on small entities, and on how the burdens may be reduced.

We acknowledge that the statute requires that an Internet safety policy be made available to the Commission upon its request. In response to the Commission's question as to the manner in which the Internet safety policy should be made available to the Commission and on the timing of such response, we note that certification #10 on FCC Form 486 indicates the following:

"I recognize that I may be audited pursuant to this application and will retain for five years and all records, including Forms 479 where required, that I rely upon to complete this form and, if audited, will make available to the Administrator such records."

Therefore, we suggest that, consistent with the existing FCC Form 486 certification, if audited, that the Internet safety policy be one of the documents that may be requested by the Administrator who, in turn, could make such records available to the Commission. However, we note that especially for large applicants such as those filing consortium-type applications and who are otherwise looking to aggregate demand for the purpose of driving a cost effective solution, the additional administrative burden associated with requesting and maintaining the Internet safety policies of each consortium recipient is one more reason why fewer and fewer billed entity applicants will be willing to serve as consortia leads. The overall impact to the fund is that there will be fewer consortium-type applications filed, the costs for individual entities will be higher, and the resulting drain on the fund due to higher costs for the discounted portion will most likely not offset any repayment captured through the audit process.

Again we note that these additional burdens—which have not been required over the seven years that CIPA has been in effect—seem to be without purpose. If the Commission is concerned about the ability to recapture funds from recipients who may be non-compliant with the requirements of CIPA, we remind the Commission that the legal certifications on FCC Form 479 and Form 486 cite the relevant sections of the statute and remind applicants of the penalties associated with the False Claims Act.

NPRM Section (III)(B)(16):

16. Finally, we propose to add a rule provision requiring public notice and hearing to address any proposed Internet safety policy adopted pursuant to CIPA. Although this is mandated by the statute and was discussed in the *CIPA Order*, there is no provision addressing this issue in the existing rules. As discussed in the *CIPA Order*, this public notice and hearing requirement only applies to entities that have not already provided such notice and hearing relating to an Internet safety policy and technology protection measure. We seek comment on this proposal.

We note that the description above indicates that the Commission proposes to add a rule requiring public notice and hearing to address any proposed Internet safety policy adopted pursuant to CIPA and then goes on to say that “this” (meaning the public notice and hearing) is mandated by the statute. We wish to make clear that the statute does not mandate a hearing. 47 U.S.C. § 254(h)(5)(A)(III), 47 U.S.C. § 254(h)(6)(A)(III), and 47 U.S.C. § 254(l)(1)(B) all state the following:

“...shall provide reasonable public notice and hold at least one public hearing **or meeting** [bold emphasis added] to address the proposed Internet safety policy.”

It is of interest that the Commission seeks to add a rule but does not propose to add a corresponding certification. This leads us to believe that the current legal certifications contained in Forms 479 and 486 which cite the relevant section of the statute are believed to be sufficient for any cost recovery attempts that may need to be undertaken. It is difficult, therefore, to understand the need to add this rule seven years after the initial implementation of CIPA.

However, if the Commission feels compelled to move forward with the proposed rule contained in Appendix B, we offer the following change noted in brackets and bold-face type below to add the phrase “or meeting” to the rule heading. In the past year, some applicants have been asked during PIA review to provide evidence of a hearing. We called this issue to the attention of the SLD given that its web site at that same time also indicated the need for a hearing without recognizing that reasonable public notice of a meeting was also allowable. We acknowledge that even though the NPRM text refers only to a mandated hearing, the text of the proposed rule properly identifies the option of a hearing or meeting. Adding the proposed language to the rule heading, if such a rule is deemed necessary at all, would provide further clarity and consistency with the requirements of the Act.

§54.520

(h) Public notice; hearing **[or meeting]**. A school or library shall provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy.

Summary

We ask that the Commission carefully review the necessity or benefit of making the proposed changes. As we have pointed out, the burdens and delays associated with form and instruction changes, online form programming, and OMB approvals, not to mention the time and energy that

will be required to deal with the confusion associated with these changes, are unnecessary. Further, any certification or rule changes that may require collecting Forms 479 a second time if the proposed timeline is carried out is also fraught with significant problems.

At a time when libraries and schools are desperate to increase their broadband capacities and at a time when budgets are stressed due to current economic conditions both at the state and local level, we question the value of “more accurately reflecting” statutory changes or imposing new certifications. We believe that there are other ways to deal with the certification requirement as proposed in our comments. We fear that the impact of the additional proposed changes will cause funding delays and will also further deter libraries and schools from applying for funds. We have already pushed many applicants to their limits in terms of program requirements.

We remain hopeful that the Commission will give thoughtful consideration to ways in which to advance the purpose of the program—providing libraries and schools with access to advanced telecommunications and information services—and will focus its energies on program simplification to ensure that outcome rather than on making non-substantive revisions to rules that may lead to further confusion, additional burden, and funding delays.

We appreciate this opportunity to express our concerns.

Respectfully submitted,

A handwritten signature in black ink that reads "Emily Sheketoff". The signature is written in a cursive, slightly slanted style.

Emily Sheketoff
Executive Director
ALA Washington Office