

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
	)	CC Docket No. 96-45
Federal-State Joint Board on	)	
Universal Service	)	FCC 01-143
	)	and
	)	DA 01-975
	)	
	)	

**COMMENTS OF THE  
AMERICAN LIBRARY ASSOCIATION**

Submitted,  
May 23, 2001

## I. INTRODUCTION

The American Library Association (ALA) respectfully submits its comments in the above referenced proceeding (CC Docket No. 96-45, FCC 01-143) regarding the Federal Communications Commission's (FCC's) Further Notice of Proposed Rulemaking and Order. Comments are also provided on the FCC's Pleading Cycle (CC Docket 96-45, FCC 01-975) regarding the disposition of unspent or undisbursed funds.

The American Library Association, founded in 1876, is the oldest and largest library association in the world. With a membership of more than 60,000 librarians, library trustees, library educators, friends of libraries and other interested persons from every state, ALA is the chief advocate for the people of the United States in their search for the highest quality of library and information services.

The American Library Association commends the Commission for seeking to address the gap between the demand estimate -- more than \$5.1 billion in Year Four -- and available funding for the Universal Service Schools and Libraries, or E-rate program, which is capped at a level of \$2.25 billion annually. It is also appropriate and consistent with the Telecommunications Act of 1996 for the FCC to propose changes to the rules to ensure that the E-rate discount funding reaches the neediest schools and libraries (47 U.S.C. § 254; 47 C.F.R. §54.500 and 54.505). However, we respectfully disagree with the timing of the proposal as set forth in the Notice (FCC 01-143), and consequently, view as premature the Commission's proposed revised method (Option Two) for allocating

discounts "...when there is insufficient funding to support all requests for internal connections...." The proposed revised method, identified as Option Two in the Notice, would permanently exclude otherwise eligible applicants that receive funding for internal connections or "Priority Two" services in one year from eligibility for such funding in the next funding year. If approved by the FCC, Option Two would be implemented in Year Four. ALA has strongly argued in previous filings (see ALA Comments and Reply Comments to CC Docket 96-45 FCC 01-31, the Children's Internet Protection Act Notice of Proposed Rulemaking or NPRM), that changes to the rules of the Universal Service for Schools and Libraries, or E-rate program, after the application period has ended and required technology plans have been filed, is unfair to E-rate applicants and is inappropriate and inconsistent with the principles of section 254 of the Telecommunications Act of 1996.

Additionally, the trigger for the proposed option should not be "...when there is insufficient funding to support *all requests* [emphasis added] for internal connections..." but rather, when there is insufficient funding cover all requests within a predetermined discount/poverty level (e.g., 90-80 percent).

We, therefore, support during Year Four the FCC's Option One of maintaining the current rules which direct that the remaining funding be prorated by discount band when there is insufficient funding (47 C.F.R. §54.507 (g)(1)(iv)). ALA also strongly recommends, prior to considering any program rule that would change the method of allocating funds, that the FCC conduct and distribute publicly an impact analysis to identify the possible

effects of any proposed changes. ALA would also recommend that the FCC use that analysis to determine and propose specific criteria and guidelines for triggering appropriate and thoughtful options (other than prorating the remaining funds) for addressing a predefined level of funding insufficiency. The FCC also needs to provide the raw disaggregated data of the E-rate program to the applicant community so that they may also conduct such an analysis (and any other analysis that is needed). Analysis of Year Three and Year Four applications and funding commitments would indicate not only the impact of the proposed change on libraries, but could also facilitate testing of all options that would possibly work towards getting E-rate funding to the neediest libraries and schools. It is therefore not reasonable for the FCC to consider permanently changing funding priorities and implementing a new rule without adequate analysis of the impact of the change. In fact, the proposed change, instead of getting discounts to the neediest applicants, may have the unintended consequence of undermining the ability of all E-rate recipients to effectively leverage their internal connections discounts for other funds. The E-rate program, despite its faults and needed improvements, is a critical program that has successfully assisted public libraries to leverage their E-rate discounts for other technology funding. Changes to the program without adequate analysis could completely alter the existing positive benefits and usefulness of the E-rate program without bringing about intended benefits.

Other key factors in ALA's support for Option One (use the current rules) and opposition to Option Two will be discussed later in these Comments. The key factors are:

1. The principles of section 254 of the Telecommunications Act of 1996 that emphasizes the need for the E-rate program to be "specific, predictable and sufficient." (47 U.S.C §254 (b) (5))
2. The inability and inadequacy of the current discount calculation method to fairly calculate the appropriate discount level of libraries, especially the neediest libraries.
3. The potentially destructive impact of the Option Two proposal on consortia due to removal of certain entities funded in Year Three from a funded Year Four consortia application.
4. The inconsistency and conflict between recent FCC decisions/orders in support of and requiring multi-year contracts and the requirements proposed in Option Two.
5. The possibility (or uncertainty) of having undisbursed funds in Year Four.

## II. COMMENT ON OPTION ONE: KEEP CURRENT FUNDING PRIORITY RULES WITHOUT MODIFICATION

The American Library Association, without consideration of the actual merits of the rule change proposed in Option Two, strongly urges the FCC to keep the current funding priority rules without modification (47 C.F.R. §54.507 (g)) throughout Year Four. This is not to imply that the current rule requiring prorating the remaining funds is the most desirable option for libraries. Option One is the only reasonable alternative for governing the allocation of insufficient funding for internal connections in Year Four. There are

several factors that hold weight in ALA's support for Option One and thereby, opposition to the Commission's proposed rule changes in Option Two.

***Rules in Place During Application Period Should Remain in Effect***

One factor is the simple principle argued in previous filings (see ALA Comments in response to the FCC's NPRM regarding CIPA, CC Docket 96-45, FCC 01-31), that proposed changes to the rules after all E-rate applications have been filed for a funding year -- and when such changes are implemented during that same funding year -- are inappropriate and unfair. Essentially, in the current Notice (FCC 01-143), the FCC proposes to retroactively apply a new rule. As noted in the previous ALA filing referenced above, "The FCC should, and may be legally required, to avoid retroactive application of the statutory requirements, especially where the statute does not unequivocally require it to do so. Retroactive application of statutes is not favored. Rights and expectations that may have arisen from actions taken and expenditures made ...should not be infringed or frustrated." (P. 4) Applicants who filed their applications, technology plans, and associated documentation in good faith based on the current program rules should be able to expect that the eligibility rules remain intact, at least for that application period and funding year. ALA therefore is opposed to the FCC making any substantive changes to the universal service program rules in a funding year after the application window has closed. In fact, ALA strongly urges the FCC never to apply any substantive changes to the program rules, especially pertaining to eligibility, during a program year after the applications have been filed.

Applicants have a right to expect that the FCC would do everything possible to abide by the principle of predictability for the E-rate program. Applicants also have a right to expect that the FCC would not subject them to constantly changing and undependable rules. Year Four library and school E-rate applicants that received internal connections funding in Year Three in good faith invested significant time and staff resources in their Year Four applications. Any substantive changes to the program rules in Year Four after the application period ends certainly violates the principles of predictability and program consistency for these applicants and applies new rules retroactively.

***Keep Current Rules Until Adequate Impact Analysis is Conducted***

In addition, the priority allocation method should remain as current rules dictate until an adequate data analysis indicating the impact of the proposed change is conducted.

Related to this is the long-standing issue of public access to the raw E-rate program data. Since the beginning of the program, ALA has requested timely, ongoing access to the data to facilitate analysis of the E-rate program. The applicant community, like the vendor community, is expected by its constituencies to conduct the needed analysis and has an obligation to use the data to understand and communicate trends, impact of proposed changes, and general program progress.

Analysis of Year Three and Year Four applications and funding commitments would indicate not only the impact of the proposed change on libraries, but could also facilitate testing of all possible options that could work towards getting E-rate funding to the neediest libraries and schools. Additionally, this analysis would provide the applicant

community with the information needed to make reasonable and fact-based comments on any proposed changes. Consequently, without adequate analysis, it is not reasonable for the FCC to take any action to change the rules at this time. The need for further analysis will be discussed in more detail under the Option Two Comments.

Based on these considerations, the only viable option for the allocation method is the current rule that requires prorating the remaining funds among the applications for internal connections at the 90% discount level. This option in fact may not be the most desirable option for libraries, but it is the accepted and known program rule that existed at the time of the opening and closing of the application window. Those that receive funding may get far less than the amount requested (possibly only 73% of the funding request, according to the Schools and Library Division's Web site).

### ***Current Rules and the Library Discount Calculation***

It is also important to acknowledge that funding shortfalls and the inability of the program to get to the lower discount levels is nothing new. Library applicants have expressed concern for the past two years that funds for internal connections are not adequately reaching libraries. Libraries receive a little more than 3% of all E-rate funding and an even smaller percentage of funding for internal connections. ALA, the ALA E-rate Task Force, and individual library E-rate applicants have repeatedly informed the Schools and Libraries Division and the Common Carrier Bureau that under the current rules, funding trends indicate that few libraries (and in particular, due to the

discount calculation method libraries are required to use) will ever be able to get internal connections funding.

While a problem exists in the priority funding rules, an even greater problem exists with the formula for calculating the discount level for libraries. This problem prevents many libraries from reaching the 90% discount level. In discount calculation libraries must use the poverty level of the school district (usually a very diverse economic area) as opposed to the closest elementary school that is often at the 90% discount level. Thus the poverty level of a library service area is diluted and many libraries that are in the particularly high poverty areas have had little ability to get internal connections discounts. Therefore, the current rules should apply for the few libraries that qualify for internal connections funding until an appropriate library discount calculation method is put in place.

For these reasons the Association supports Option One, making no change to the current rules and allocation method.

## II. COMMENT ON OPTION TWO: CHANGE THE ALLOCATION MECHANISM IN YEAR FOUR

The American Library Association is opposed to the Commission's proposed Option Two that would permanently change the allocation mechanism in Year Four to eliminate applicants that received funding for internal connections in one year from receiving such funding in the next year. The FCC also proposes in Option Two to remove from funded

Year Four consortia applications entities that received funding in Year Three. ALA is also opposed to this aspect of the Option Two proposal, regardless of its implementation date. The Association's opposition to Option Two is based on some of the reasons already mentioned, as well as additional concerns about adverse impacts of the proposed change.

***A Rule Change in Year Four and After the Application Period is Inappropriate***

As stated earlier, ALA adamantly opposes implementation of the proposed change in Funding Year Four. ALA finds that implementation of the proposed change in Year Four is inappropriate and violates the principles of the Telecommunications Act of 1996. There are seven principles listed in section 254 (b) of the Telecommunications Act of 1996. One of the principles is that the E-rate discount program or "support mechanisms should be specific, predictable, and sufficient." Already, applicants for Year Four discounts must adhere to new requirements of the Children's Internet Protection Act/ Neighborhood Children's Internet Protection Act put in place after the window closed January 2001. For the FCC to propose another significant and substantive change to the program rules after the window has closed is extremely unfair and is an unnecessary burden to the more than 37,000 applicants who spend months preparing not only their applications, but also associated documentation and revising or updating their technology plans. The American Library Association therefore is opposed to substantive changes during any funding year of the E-rate program that are not made prior to the opening of the application window; and is certainly opposed to implementation of Option Two in Year Four.

***Adequate Impact Analysis Should Precede Eligibility Rule Changes***

As also mentioned in the previous section, no decision should be made by the FCC to change the funding allocation method for internal connections until an impact analysis is conducted and made available to the public for review. A change in the funding allocation method changes the program eligibility criteria, and therefore, should be subject to close scrutiny and appropriate analysis prior to making such changes. The Schools and Libraries Division (SLD) on Friday, May 18, 2001 posted on its Web site a general, aggregated analysis of the impact for all E-rate program participants. While the information provided is helpful, it fails to indicate the possible impact on libraries of the Option Two proposal, as well the impact on consortia and multi-year contact applicants from Year Three. Consequently, without adequate analysis, it is not reasonable for the FCC to permanently change and implement a new rule -- change eligibility criteria -- without adequate analysis of the actual impact of the change. In fact, the proposed change, instead of getting discounts to the neediest applicants, may have the unintended consequence of undermining the ability of all E-rate recipients to effectively leverage their internal connections discounts for other funds.

In the recently completed Stage Two Report on a study of all technology related funding in public libraries, "The Impact on the Digital Divide of the Internet in Public Libraries," the importance of leveraging E-rate for other technology funding in libraries was emphasized. Noted researchers Dr. Charles McClure and Dr. John Bertot reported that their preliminary findings indicated that the most critical role of E-rate was its importance

in enabling public libraries to leverage their E-rate discounts/savings to get additional technology funding (<http://www.ala.org/oitp/telcom/e-ratestage1.html>).

***FCC Required Multi-year Contracts Adversely Impacted***

In addition to inappropriately denying all Year Three E-rate recipients of internal connections funding from eligibility to receive internal connections funding in Year Four, the proposed rule change would also unfairly deny Year Three E-rate recipients with multi-year contracts. The use of multi-year or long term contracts is a practice encouraged by the FCC regulations (47 C.F.R §54.507 (e)) and required by the FCC in at least two of its recent decisions/orders: Tennessee (FCC Decision and Order, FCC 99-216, adopted August 11, 1999, Request for Review by the Department of Education of the State of Tennessee) and Brooklyn (FCC Decision and Order 00-354, adopted September 25, 2000, Request for Review by the Brooklyn Public Library). In these decisions, the FCC denied full funding of otherwise eligible and fundable applications for E-rate discounts for internal connections and required the applicants to spread the costs over multiple years rather than completing projects in one year. The FCC's rationale for requiring multi-year contracts was that the \$2.25 billion funding level would easily be diminished among a few applicants with large projects. These innovative technology projects are ambitious and are reaching a substantial number of persons in poverty stricken communities. Applications as well as technology plans have been submitted during Year Four to continue these projects over multiple years, as suggested by the FCC in Year Three.

To change the rules after requiring use of multi-year contracts is unfair and potentially destructive to applicant's ability to implement and/or complete the invaluable projects already planned.

Although there is no guarantee of funding from year to year, otherwise eligible applicants should be able to expect predictability in the eligibility rules and program consistency in planning their budgets and technology projects. Applicants must assess the adequacy of funding to accomplish the projects envisioned in the technology plans and applications. Intensive reviews are accordingly made by the Program Integrity Assessment Unit (PIA) to ensure that the applicant has the necessary resources. A decision by the FCC to change the program rules mid-stream would jeopardize the sustainability of the technology projects of Year Four applicants that signed multi-year contracts in previous funding years, especially in Year Three. The aforementioned applicants abided by the FCC decisions and accordingly changed their contracts, as well as other funding commitments, to comply with the FCC multi-year funding directive. If the proposed program rule change is made in Year Four, these and other similarly situated applicants will not get funding for internal connections in Year Four because they received internal connections funding in Year Three. Thus, the proposed Option Two inappropriately and unfairly changes the program eligibility rules such that this group of applications will be summarily denied without due process, except through appeals to the courts.

***ALA Opposes FCC Trigger for Option Two***

The FCC has indicated that the trigger for using the proposed Option Two would be "...when there is insufficient funding to support *all requests* [emphasis added] for internal connections...." If the FCC decides to implement Option Two, ALA urges the FCC to define the trigger as "when there is insufficient funding to cover all requests within a predetermined discount/poverty level (e.g., 90-80 percent) for internal connections" in order to actually reach the neediest libraries and schools. Based on current demand, without raising the \$2.25 billion cap, it is likely that there will always be insufficient funding for "all requests for internal connections." Associated with developing a defined trigger, ALA also strongly urges the FCC to develop specific guidelines and a formula for ensuring that E-rate discounts for internal connections are provided to the libraries and schools with the higher discount/poverty levels.

***Adverse Impact on Consortia/Shared Services Applicants***

In the Option Two proposal the FCC provides that member entities of consortia or shared services applications for internal connections in Year Four will be removed from the consortia if they received internal connections funding in Year Three. This provision would devastate the concept of consortia/shared services, act as a disincentive to cooperative projects, and essentially destroy another important benefit of the E-rate program. Cooperation among entities in close geographic proximity has reduced duplication and facilitated the sharing of expertise (both technical and in filing for E-rate) and pooling of resources. The value of consortia/shared services is recognized by the Act. To change the ability of a consortia/shared services group to work cooperatively in

the E-rate program can undermine and destroy consortia (including library consortia) as an applicant type. Consequently, removing a member of a consortia is a fundamental and critical change in the E-rate program eligibility rules and could have a far reaching, negative impact on the future benefits and successes of the program. Again, such fundamental changes are opposed by ALA, and they at least warrant further analysis and consideration prior to implementation.

***Demand Estimate and Undisbursed Funds***

There is a history of inaccurate demand estimates, applicant failures to file Form 486s in a timely manner, excess funds set aside to cover appeals, and other circumstances that have resulted in a significant amount of "undisbursed" or left-over funds in previous funding years. It is also plausible that the demand estimate will again be reduced. Thus, it is possible that the funding shortfall that instigated the FCC's Notice and proposed internal connection funding rule change will be changed substantially next year and again circumstances may generate an unacceptably high level of undisbursed funds. The American Library Association, in response to the NPRM in FCC 01-143 and in response to the FCC Pleading Cycle in DA 01- 975, strongly urges the FCC to address this issue in the following manner (assuming all Priority One funding has been committed to all eligible applicants):

1. All undisbursed E-rate funds for a funding year should never be distributed to eligible exchange carriers to reduce their contribution into the universal service fund. This occurred in Year One of the program and ALA strongly opposes this ever taking place again.

2. All undisbursed funds for a funding year should first be distributed to eligible libraries and schools that filed their applications in a timely manner.
3. Distribution of undisbursed funds should first be made to applicants that received pro-rated funding for internal connections and then to the next lower discount level applicants.
4. Remaining funds should be awarded to same year applications filed outside of the window, as occurred in Year Two.
5. After commitments have been made for all applications for internal connections, any remaining funds should be rolled over to the next funding year.

#### IV. Conclusion

The American Library Association supports Option One -- keep the current rules for allocating funding. ALA also opposes Option Two -- fund internal connections for eligible applicants every other year, and particularly opposes implementing this change in Year Four.

ALA agrees with the FCC that a change is needed to address the gap between the funding demand and available funding. However, we disagree with the FCC's Option Two proposal and its implementation after the application period has ended and without adequate impact analysis. We offer that due to the scope of the possible negative impacts of this change, it is prudent and reasonable to conduct the needed analysis prior to changing the eligibility rules as proposed in Option Two.

ALA therefore urges the FCC to:

1. consider the issues set forth in these Comments,
2. adopt Option One as its only reasonable alternative for Year Four,
3. postpone further action on this matter until the needed impact analysis and exploration of other options and criteria can be conducted by the FCC, and
4. provide the program data so that the applicant community may also analyze the impacts and possibilities for changing the allocation method.

We appreciate the opportunity to submit these Comments and thank the Commission in advance for your consideration.

On the behalf of the American Library Association,

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