Before the
Federal Communications Commission
Washington, DC 20054

In the Matter of:

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

REPLY COMMENTS OF THE AMERICAN LIBRARY ASSOCIATION IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

The American Library Association (ALA) is pleased to provide reply comments on the Notice of Proposed Rulemaking (NPRM) for the E-rate program. We wish to reiterate our appreciation of the Federal Communications Commission (FCC) for recognizing that there are many successes with the E-rate program, but that parts of it could be improved to increase the positive impact of the program for more applicants. ALA takes this opportunity to respond to comments specifically on the proposal to add leased dark fiber to the Eligible Services List (ESL) and the streamlining of the discount matrix. Finally, we offer comment on what we see as a number of inconsistencies in terminology throughout the rules as written.

Expanded Access to Low-Cost Fiber

ALA lauds the Commission's intent to provide libraries and schools with more flexibility to pursue the most cost-effective broadband solutions. Virtually all libraries provide their communities with critical services available via advanced telecommunications services. Leasing dark fiber may be the best solution for some libraries.

We focus our comments on the Commission's proposal to add "leased dark fiber" as an eligible service along with the proposal that schools and libraries be permitted to receive E-rate discounts when certain products/services are provided by other than telecommunications carriers. In reviewing the comments of other parties, it appears that many different assumptions have been made as to what the Commission may or may not intend with regard to the eligibility of dark fiber. Given the financial responsibility of any organization when executing contracts – and

especially so when such contracts are tied to E-rate compliance requirements – it is essential that the Commission be clear about what it means by referring to the Funding Year 2003 Eligible Services List (ESL) as the basis for eligibility. This is especially necessary in light of the fact that the Commission proposes that non-telecommunications carriers may be able to provide such products since that was not the case during Funding Year (FY) 2003. Applicants must have a clear understanding of the Commission's intent, the corresponding rules, and the procedures for ensuring compliance before they enter into contracts that are likely to be long-term and covering multiple funding years. Funding denials and or commitment adjustments (COMADS) after contracts are already executed are unacceptable but could be a concern if the Commission is not clear about the corresponding eligibility issues.

First, we assume that the Commission did not intend to imply in paragraph 52 that such services could not ***also*** be provided by telecommunications carriers in the telecommunications category of service consistent with the FY 2003 ESL, i.e. "We seek comment on permitting recipients to receive support for the lease of fiber, even if unlit, from third parties that are not telecommunications carriers…"

Second, we strongly support the principle that the provision of dark fiber, even when provided by non-telecommunications carriers, must be the most cost effective solution consistent with 47 C.F.R. § 54.5040(a)(1)(xi). We note, however, that there are operational issues that may arise when complying with this rule and that deserve further consideration and clarification before final rules are adopted.

Third, the application of the "Evaluation of Applicant Ownership Prohibition" guidance that would or would not apply to dark fiber is somewhat unclear given that dark fiber – even on a leased basis – is likely to be for the exclusive use of the applicant. For example, since program support cannot be used for full construction costs, at what point will the FCC/SLD consider a long-term lease for dark fiber equivalent to a prohibited purchase of Wide Area Network (WAN) facilities? We ask the Commission to carefully review its guidance in this area and make any necessary changes to comport with its proposal to make fiber service eligible from any entity.

Fourth, it is unclear how "Amortization of Capital Investments Costs" would be applied to leased dark fiber. Costs associated with the provision of Telecommunications Services and/or Internet Access Services, service provider equipment costs and/or a non-recurring charge for capital investment by the service provider can be included in funding requests under certain conditions. In those situations, applicants entering into multi-year contracts with upfront or non-recurring charges of $500,000 or more are allowed to prorate the total charge over the life of the contract or, as was the specific situation in the case of the Brooklyn decision, over a period of at least three years. We assume that the Brooklyn decision for supporting construction costs applies to

non-telecommunications carriers, or even to all carriers for non-shared facilities as may be the case with the lease of dark fiber, but we ask for confirmation of this.

In allowing for dark fiber in FY 2003, the FCC in its ESL described dark fiber as "excess capacity" indicating that "dark fiber refers to fiber optic cable that is unused or "dark." This statement seems to imply that the FCC intended to allow dark fiber where the fiber already existed but was not currently being used or "lit." Again, it is unclear whether or not the Commission now intends to fully fund the capital costs of dark fiber deployment – if over a multi-year contract period – or whether it intends to allow dark fiber to be made available (leased) to schools and libraries where it may already exist but is not being used or lit. If only the latter is allowed this will severely limit this proposed change and we do not think this is what was intended in the National Broadband Plan.

Fifth, the NPRM and the ESL indicate that applicants seeking leased dark fiber must use it "immediately." We understand this requirement to mean that it is not the intent of the Commission for the fund to be used to purchase or hold "real estate" for future use. We commend that requirement in light of the demand for Priority One services. However, we ask that the Commission clarify what "immediate" means such that applicants can knowledgeably prepare requests for proposals and enter into subsequent contracts.

And sixth, if it is the intent of the Commission to shift at a later point from allowing the lease of dark fiber to allowing for the ownership of dark fiber, we ask that the Commission address this possibility before making dark fiber an eligible service. While applicants are clearly frustrated in many areas of the country at the inability to receive needed capacity at affordable service costs, so too will the applicants be frustrated if they enter into multi-year lease agreements for dark fiber only to find that a year or two from now that the Commission intends to allow the fund to be used for the purchase of WAN facilities through fiber or other high-capacity solutions. If applicants know they may be able to own fiber at some later time, this can be factored into any negotiations for leasing it.

For all of these reasons, we ask that the Commission carefully consider and communicate the applicability of the existing or new rules to the leasing of dark fiber as part of any final decision. Also, without some better understanding as to how the proposed rules will be applied, it is impossible to consider what the impact might be to the fund.

If the Commission is not able to clearly articulate these issues in its decision, we also ask for an additional opportunity to provide comment. Specifically, we ask the Commission to:

1. Clarify the Eligible Services List to identify the category(ies) of service in which dark fiber will be supported and by whom it may be supplied or lit.

2. Identify the circumstances or conditions under which applicant ownership of fiber will be allowed or prohibited, and related lease provisions that will be applied to dark fiber.

3. Address the applicability of one-time or non-recurring costs in the leasing of dark fiber.

4. Define what "immediately" means in terms of lighting the dark fiber.

5. Address any consideration by the Commission to offer ownership of dark fiber as an eligible service such that informed contractual decisions can be made.

Urban/Rural Definitions

Given the many differing comments on the issues surrounding the proposed revisions to the urban/rural definitions, we ask that the Commission take into account the practicality of revising all of the steps associated with such a change. The simplest approach which disadvantages the fewest number of applicants should be the criterion for making this change.

Terminology in the Rules

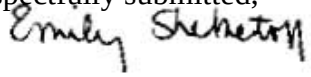
We are concerned about the many inconsistencies caused by the proposed rule changes. Further, we are concerned about introducing *new* terminology due to the ripple effect of such new terminology throughout the entire E-rate application and invoicing process. As one example, we suggest that the Commission look at all of the ways the newly defined term "applicant" may or may not be accurately used throughout the NPRM and rules. We remind the Commission that even under the existing rules, it is not the "applicant" who must have a technology plan but rather an eligible school or library or recipient of service who must. An "applicant" may be a state, a city, a county or some other coordinating entity none of which may be required to have a technology plan. There are many other examples of how making these changes – especially when done in some places in the rules but not in others – will create a great deal of confusion for both the "billed entity(ies)" and for the "recipients of service."

We also note that the term "recipient of funding" appears to be newly introduced as well. Rather than using new terms, we would suggest using the existing language of the program. In this case, it is likely the Commission is referring to the billed entity. Recipients of service are not necessarily recipients of funding.

We also call to the attention of the Commission the different terminology used between the rules, the ESL, Orders, and guidance. We strongly suggest that the "terms of art" currently being used for the program be maintained in order to limit confusion and that where such changes remain, that the Commission make changes to both those sections of the rules that do not currently include other revisions as well as those where rule revisions are proposed. It is extremely difficult to interpret the rules when terminology is inconsistently used.

In conclusion, ALA requests the Commission proceed with any program changes with a comprehensive perspective of the impact of such changes throughout the E-rate program and, in particular, on the applicant experience. We also request that the Commission consider allowing for further comment once it has addresses these issues but prior to making final decisions in an Order. This is necessary in order to prevent any unnecessary applicant confusion during the transition to the new Rules from the current E-rate program. Libraries across the country depend on the E-rate program to support their ever-growing telecommunications needs. ALA considers this opportunity to provide comment on the proposed program changes as critical for the continued success of the program. Thank you for considering these reply comments.

Respectfully submitted,



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