BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

Petition by the State E-rate Coordinators' Alliance for Clarification And/Or Waiver of E-rate Rules Concerning Technology Plan Creation And Approval under the Schools And Libraries Universal Service Support Mechanism	)	**CC Docket No. 02-6**
Comprehensive Review of Universal Service Fund Management, Administration and Oversight	)	**WC Docket No. 05-195**

INITIAL COMMENTS OF THE
THE STATE E-RATE COORDINATORS' ALLIANCE
IN SUPPORT OF THE PETITION

I. Introduction

The State E-Rate Coordinators' Alliance ("SECA"), representing 42 States and one United States Territory, applauds the Federal Communications Commission ("FCC" or "Commission") for promptly issuing a Public Notice to seek comments and reply comments on the February 21, 2007 Petition that SECA filed.

SECA's Petition seeks relief from the current interpretation and administration of the FCC's rules regarding the technology plan requirement that applicants to the Universal Service Support Mechanism for Schools and Libraries (commonly referred to as "E-rate") must satisfy. Our Petition sought immediate relief on behalf of the many aggrieved applicants who have already suffered adverse consequences and on behalf of all other applicants that may become a target of adverse action concerning the existing technology plan regulation. The remedy sought in SECA's Petition does not require the FCC to amend the language of its regulations. Instead, this remedy more simply requires explicit direction to USAC as to the appropriate interpretation and administration of the existing language of the technology plan requirement.

These comments further clarify the SECA short-term proposal for relief as set forth in our Petition. Funding denials and funding rescissions based on technology plan infractions should be confined to only those situations where an applicant applies for E-rate services other than basic telecommunications services,[1] and does not have an existing, approved plan in effect for the *current* funding year at the time that the applicant submits its E-rate funding applications for the upcoming funding year. As long as an applicant has such an approved technology plan , the applicant should have the opportunity to cure **any** technology plan deficiencies that USAC may identify before or during the upcoming funding year.

While SECA encourages the FCC to grant the requested relief sought in our Petition and as further clarified in this Initial Comments, the FCC must not stop there and should *not* consider the problem to be solved by granting this relief. We urge the FCC to consider a long-term,

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[1] Under E-rate program rules, applicants that request funding for basic telecommunications services are not required to comply with the technology plan requirement. 47 C.F.R. §54.504(b)(2)(iii)(C); §54.504(c)(1)(iv)(C). These Initial Comments pertain to those applicants that are required to comply with the technology plan requirement, unless otherwise noted.

permanent solution that would greatly streamline the E-rate program, and reduce the number of appeals stemming from technical rule violations, consistent with the goals set forth in the Comprehensive Reform proceeding[2] SECA's Comments and Reply Comments filed in that docket[3] and the recent orders that the FCC has issued to allow applicants to cure mistakes that are ministerial and do not compromise program integrity.

The FCC should develop a stronger partnership with state and federal agencies that already promulgate technology plan requirements and review and approve these plans, and accept these organizations' approvals as evidence of compliance with the E-rate technology plan requirement. The states already have robust technology planning processes and procedures in place and there is no need for the FCC and USAC to oversee these processes – which is the *de facto* effect of the current regulations. The FCC should defer to the state approval processes and no longer delve into the specific attributes and contents of technology plans.

II. SECA's Proposed Short-Term Solution to the Existing Technology Plan Requirements.

A. Existing Technology Plans Should Serve As A Sufficient Foundation For Submitting Next Year's E-rate Applications.

The current regulation governing E-rate technology plan requirements, 47 C.F.R. §54.508, was promulgated in the FCC's Fifth Report and Order in CC Docket No. 02-6 (FCC

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[2] Comprehensive Review of Universal Service Fund Management, Administration and Oversight, WC Docket No. 05-195, SECA Initial Comments filed October 17, 2005 at pp. 59-62; SECA Reply Comments filed December 19, 2005 at pp. 8-12.

[3] Comprehensive Review of Universal Service Fund Management, Administration and Oversight, WC Docket No. 05-195, SECA Initial Comments filed October 17, 2005 at pp. 59-62; SECA Reply Comments filed December 19, 2005 at pp. 8-12.

04-190). There the FCC clarified that applicants are expected to develop a technology plan prior to filing a Form 470 request for services, and that approval of the plan must occur prior to beginning to receive service as reported on FCC Form 486.[4] Recognizing that the earlier regulation was not consistent with the language of FCC Form 471, the FCC granted a waiver of any situation where an applicant obtained approval of its technology plan *after* the applicant filed FCC Form 470 but before service commenced.[5]

USAC has administered the current rule to determine that an applicant with an approved, existing technology plan that expires prior to the last date of service of the upcoming funding year cannot rely on this plan as the basis for posting a new FCC Form 470 Request for Services. For example, under current procedures, if an applicant has a written technology plan that was approved by an SLD-certified technology plan reviewer and the plan expires prior to June 30, 2008, this technology plan is *not* sufficient for supporting the posting of a FCC Form 470 Request for Services for FY 2008 (July 1, 2008-June 30, 2009).

A FCC Form 470 typically must be submitted approximately nine months prior to the beginning of the funding year. Consequently under this interpretation, E-rate applicants are compelled to write their technology plans very far in advance (approximately nine to 21 months) of the period in which the services would be delivered. Given the rapid pace of changes in technology, this time lag between preparing and implementing a technology plan could cause the plan to become outdated very quickly.

Equally as concerning, an applicant may not be aware of the prerequisite of writing its technology plan by time that the applicant posts its FCC Form 470. An unsuspecting applicant

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[4] *Id.* at ¶56.

[5] *Id.* at ¶57.

could earnestly undertake the posting of FCC Form 470 and preparation of FCC Form 471, file these forms, and comply with all other program rule requirements, and later learn that its applications were doomed because the applicant's technology plan for the upcoming funding year was not written as of the date that the applicant posted its FCC 470.

The FCC has already recognized in the *Brownsville Independent School District Appeal Order*[6] that it is appropriate and necessary for USAC to perform additional outreach "to better inform applicants of the technology plan requirements and to provide applicants with a 15-day opportunity to provide correct technology plan documentation.[2]" In footnote two of this Order, the FCC made clear that USAC shall apply this outreach to all pending applications and appeals. *Id.*

USAC's current interpretation appears to be based on the current language of FCC Form 470, Block 5, Item 20, which states in pertinent part as follows:

> I certify that all of the individual schools, libraries, and library consortia receiving services under this application are covered by technology plans that are written, *that cover all 12 months of the funding year,* and that have been or will be approved by a state or other authorized body, and an SLD-certified technology plan approver, prior to the commencement of service.

(Emphasis added). The nearly identical language is also set forth in FCC Form 471, Block 6, Item 26.

Applicants may not fully understand that the reference to the phrase "that cover all 12 months of the funding year" means the *upcoming funding year and not the present the funding*

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[6] Request for Review or Waiver of Decisions of the Universal Service Administrator by Brownsville Independent School District, TX, Order, File No. SLD-483260, *et al.,* CC Docket No. 02-6 (FCC 07-37) (Order released March 28, 2007).

year. Therein lays the potential trap for applicants that may cause a fatal mistake and denial of funding if the applicant misunderstands this certification.

These respective revisions to FCC Form 470 and FCC Form 471 were undertaken purportedly to comply with the new rules established in the Fifth Report and Order.[7] Yet, this operative phrase, which has caused many of the problems in the technology plan arena, is missing from the Fifth Report and Order and FCC regulations. Consequently, SECA submits, the newly revised forms created another ambiguity and inconsistency with the FCC regulations. Ironically, in seeking to resolve a prior inconsistency between the language of the FCC regulations and a required FCC form, the Fifth Report and Order created a new and different ambiguity.

Nowhere does the Fifth Report and Order or the FCC regulations explicitly state that the technology plan *for the upcoming funding year* must be written prior to posting a FCC Form 470. All that the Fifth Report and Order and FCC regulations require is that an applicant *must develop* a technology plan prior to posting a FCC Form 470. Accordingly, there is no reason why an applicant with an *existing, approved* technology plan should not be permitted to rely on that existing technology plan to post a FCC Form 470, *even if* that plan may expire prior to the end of the funding year. Under the language of the Fifth Report and Order, if an applicant does not have an existing approved technology plan, then a new plan must be developed prior to posting a FCC Form 470 for the upcoming funding year.

SECA's February 21, 2007 Petition began with the premise that many if not most applicants have an existing, approved technology plan at the time that they prepare their

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[7] 2004 Federal Register, Vol. 69, No. 194, p. 60151 (October 7, 2004).

application forms for the next funding year. SECA is confident of this fact because: (1) our members are familiar with the state-specific procedures and requirements governing technology plan preparation for applicants in their respective states; and (2) any E-rate applicant that applied for services beyond basic telecommunications services and is receiving those services at the present time must have an existing, approved technology plan in order for the applicant to have filed FCC Form 486.

Our Petition seeks to allow applicants to rely on their existing, approved plans as the basis for submitting the next-year FCC Form 470. This existing plan would support the Form 470 filing even if the plan expired prior to the last day of the funding year for which the FCC Form 470 is being submitted. This grant of relief is entirely consistent with the language of the Fifth Report and Order as well as the FCC regulations, and would require a modest revision to FCC Form 470, Block 5, Item 20. to omit the phrase, "*that cover all 12 months of the funding year.*" (Emphasis added). In the interim, the FCC should waive this requirement.

Under our approach, applicants seeking funding for services other than basic telecommunications services should prepare their new technology plans which cover all twelve months of the funding year by time they file their Form 471 application for the upcoming funding year. **An applicant's failure to comply with this time frame, however, would not be automatic grounds for denial or rescission of funding provided that the applicant has an existing approved technology plan in effect.**[8]

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[8] Any applicant that does not have an existing approved technology plan (in effect during the current funding period), and/or does not have a written technology plan for the upcoming funding year (for the period during which the 471 seeks funding), yet certifies on Form 470 and/or Form 471, that they do have a written technology plan, would not be afforded relief under this proposal. Such applicants cannot be viewed as having mistakenly comprehended the technology plan certifications in Form 470 and Form 471. Applicants that knowingly certify that they have a written technology plan when in fact they do not have an existing approved, written technology plan for

Rather, applicants with approved existing technology plans should be provided 30 days within which to comply with the technology plan requirement. If the applicant does not comply after the 30 day period, then the funding requests not supported by the applicant's technology plan should be denied or approval of the funding request should be rescinded. In other words, the vast majority of technology plan infractions should be viewed as mistakes that are curable – rather than mistakes that compel automatic denial or rescission of funding.

This position is entirely consistent with the Commission's recent Global Resolution Orders which attempt to reduce the denials of E-rate requests for situations where no waste, fraud, or abuse exists. Therefore we urge the Commission to adopt this further recommendation and instruct USAC to immediately discontinue denying or reducing E-rate requests due to technology plan violations and to provide applicants with a period of 30 days to correct technology plan errors or omissions while funding is put on hold pending the correction of the technology plan infraction. Further, the FCC should direct USAC to review all previously issued adverse determinations concerning technology plans according to the directions set forth herein and to issue revised decision letters to applicants.[9]

Consistent with the FCC's policies announced in a series of orders beginning with the *Bishop Perry Order*, funding should *not* be denied when applicants inadvertently and/or unknowingly have committed program rule mistakes made in good faith, and where there is no evidence of waste, fraud or abuse. Applicants with approved technology plans certainly are

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the current funding year, or a written technology plan for the upcoming funding year, should not be given the benefit of the doubt and their noncompliance should not be excused due to confusion or misunderstanding.

[9] Many of these adverse determinations arise when the SLD conducts random reviews of technology plan compliance when applicants file their form 486 and notifies applicants that their technology plans are deficient. Other determinations may be made in conjunction with reviewing applicants' forms 471 and may be reflected in funding commitment decisions letters.

acting in good faith, since they have already taken the time to develop a plan and submit and obtain approval of the plan. In such a situation, denial or rescission of funding should be imposed only as a last resort, and only if the applicant refuses to cure technology plan deficiencies.[10]

Last, applicants applying for telecommunications services only and that believe that their services fall under the category of basic telecommunications services, should be provided the opportunity to write a technology plan if and when SLD may determine that the applicant's telecommunications services went beyond the definition of basic telecommunications. Applicants may inadvertently believe that they are exempt from the technology plan requirement for E-rate because they may mistakenly believe that their funding requests include only basic telecommunications services. Such applicants currently have no ability to cure their mistake and they currently are denied E-rate funding altogether. These applicants should be permitted to cure their error and to write the technology plan if SLD finds that the applicant requested more than basic telecommunications service.

In the short-term, with appropriate outreach and education, applicants can be made to understand that the technology plan requirements must be met, and non-compliance with those requirements will result in delays in processing of forms, which will result in delays in receiving funding commitment decisions letters and/or funding denials when such deficiencies are not promptly fixed. An applicant that does not comply with all program rules cannot expect to be given the opportunity to cure deficiencies *and* at the same time expect to receive a funding

[10] Any and all deficiencies should be curable. Such curable deficiencies include but are not limited to a mandatory component of the technology plan is found to be missing; or a service included on the Form 471 application is not referenced in the technology plan; or the new technology plan for the upcoming funding year has not yet been written as of the date of filing Form 470 and Form 471.

commitment decisions letter before July 1 of the funding year. On the other hand, the vast majority of applicants that do comply with all program rules – including the technology planning requirements – should be rewarded by having their applications processed promptly and by receiving their funding commitment decisions letters before July 1 of the funding year.

B. The FCC Should Clarify That Applicants May Enter Into Multi-Year Contracts That Expire After the End of Their Approved, Existing Technology Plans.

SECA also sought relief for applicants that may wish to post a FCC Form 470 in order to sign a multi-year contract for a period beyond the current technology plan expiration date. The applicant should be able to receive discounts for the later years as long as the procurement is consistent with the applicant's existing technology plan.

This issue was not addressed in the Fifth Report and Order, and SECA is concerned that absent FCC clarification, USAC may deny funding or seek repayment of funding for services which were provided under a multi-year contract if the technology plan in effect when the contract was initially procured expired prior to the end of the term of the contract. While this scenario may not appear to be plausible, members of SECA have firsthand experience with E-rate auditors who seek to retrospectively penalize applicants for perceived infractions based on the auditors' literal application of FCC regulations. In this instance, the SLD's current interpretation of the FCC regulations could be construed to preclude any applicant from entering into a contract beyond the expiration date of the applicant's technology plan. Without clear FCC guidance on this point, applicants are at risk for adverse audit findings and for demands for repayment of funds.

C. Posting of Form 470 By Consortium Leads And For State Master Contracts Should Not Be Subject To The Written Technology Plan Requirement.

The SECA Petition also sought relief on behalf of consortium and state procurement processes because the procuring entity frequently has no way of knowing which entities will decide to purchase services under state master contracts and/or state networks. It is impossible for consortia leads to confirm that each potential recipient of the services being procured on the FCC Form 470 have prepared a written technology plan that addresses the use of the services. Generally, a state consortium or state master contract is created for all governmental entities in the state, including but not limited to, K-12 schools and public libraries.

Also, in many cases state procurements, and thus associated Forms 470, can occur two or more years prior to the execution of associated contracts. And because such procurements are done at the state level, it is quite conceivable that the eventual purchasing entities, such as individual schools and libraries, have no real knowledge of the state procurement process that has been initiated, let alone include those technologies in their technology plans.

Consequently, SECA strongly urges the FCC to declare that technology planning requirements should not apply to consortium or state procurement processes. To the extent that an applicant decides to make purchases under a state master contract, then the applicant must be able to support this decision through its own organization's technology plan.

II. Long-Term Technology Plan Solution

SECA urges the FCC to examine a long term solution for the technology planning issues, as a means of both streamlining the E-Rate process and also better coordinating technology

planning activities with its state partners. As the FCC itself has recognized, technology planning is *not* the commencement of the procurement process:

> We conclude that technology plans should continue to focus on ensuring that technologies are used effectively to achieve educational goals *rather than assuming a greater role in monitoring the procurement process*. We reiterate our conclusion that the technology plan should focus on "research and planning for technology needs" rather than act as preliminary RFPs.

Fifth Report and Order at ¶58 (Emphasis added; footnotes omitted).

From reviewing the FCC's early E-rate orders, we believe that the FCC never intended for the technology plan component of the E-rate program to invest the E-rate administrator with the authority and responsibility to serve as the arbiter of applicants' technology plans. Indeed, from the very beginning of the E-rate program, the FCC anticipated that the E-rate administrator would forge a partnership with state agencies that already had technology plan requirements in place.

For example, in the May 8, 1997 Report and Order in CC Docket No. 96-45 which established the initial regulations of the E-rate program, the FCC explained that the requirement for applicants to obtain independent approval of their technology plans would hopefully be accomplished by state organizations, "ideally by a state agency that regulates schools or libraries."[11] The FCC also recognized that many states already had implemented initiatives regarding technology planning. *Id.* Clearly the FCC anticipated that the E-rate administrator would not have to certify or review technology plans and this function would be performed by state agencies and other state organizations. Unfortunately, the FCC's vision has not been realized because USAC has become very involved with the details of re-reviewing technology

[11] Federal-Joint Board on Universal Service, CC Docket No. 96-45, FCC 97-157, Report and Order (released May 8, 1997) at ¶574.

plans which have already been reviewed and approved by a USAC-certified independent technology reviewer.

As SECA explained in its Initial Comments and Reply Comments filed in WC Docket No. 05-195, the most sensible approach for streamlining the E-rate program in the area of technology plans without compromising program integrity is to defer to the states' respective requirements regarding technology plan content and approval, and to state approval of applicants' technology plans.

The timing and content of the technology planning process is unique to each state's process. Inserting FCC technology planning requirements into the process adds an additional layer of complexity that is bureaucratically cumbersome and unnecessary. The E-rate technology plan requirements do not serve their intended purpose of guarding against waste, fraud and abuse but, rather, serve as a means for trapping unsuspecting, well intentioned applicants in technical rule violations that result in denial or rescission of funding.

Most states currently have a process in place for the development and approval of technology plans and we urge the FCC defer to the states' mechanisms for approval of the technology plan, allowing that process to satisfy the technology plan requirement. The states' approval alone should be accepted by the FCC as conclusive documentation for the purpose of the USF support.

There is no need for USAC to be engaged in re-reviewing technology plans and technology plan approvals as a super reviewer. Yet this is precisely the result that has ensued following the Fifth Report and Order. USAC now has undertaken review of previously approved technology plans to verify whether the plans supported the services being procured and for which E-rate support was requested. USAC has denied funding on the basis that the plan failed to

include all five required elements of an E-rate technology plan, *after* a state agency such as a State Department of Education—a SLD-certified tech plan reviewer--*approved* the plan. USAC's second guessing of State Departments of Education is extremely disturbing in light of the fact that USAC is not empowered to preempt states, which is the effect of such denials. There is little recourse that a state or applicant has if USAC overturns a state's approval of a technology plan by denying E-rate funding to the applicant. The applicant is forced to file an appeal with the FCC and seek the FCC's assistance in directing USAC to accept the state approval letter.

In light of the fact that the FCC is trying to streamline the E-rate program without compromising protections against waste, fraud and abuse, the deference to state approval of applicants' technology plans is a very basic, easy and sensible step toward achieving simplification. One layer of official review of technology plans by organizations and agencies at the state level, which SLD pre-certifies as authorized technology plan reviewers, ought to suffice to guard against waste, fraud and abuse. It is duplicative and unnecessary for SLD to then engage in a re-review and second guessing of whether the applicant's technology plan should have been approved in the first instance. This latter step should be stopped immediately.

The E-rate program has evolved significantly from its origination in 1996-1997, and the technology plan requirements have been reconfigured in such a way that the correlation has been lost between genuine planning for use of technology in our schools and libraries, and defining the services/inventory of equipment that is funded by E-rate. By deferring to state technology plan requirements, the FCC can be confident that applicants have purposefully and thoughtfully considered and decided on their procurement of E-rate services and equipment.

III. Conclusion

SECA respectfully requests that the FCC to adopt an Order granting this Petition and also adopting the recommendations in these Initial Comments as well as the technology plan recommendations set forth in SECA's Initial and Reply Comments filed in WC Docket No. 05-195.

Respectfully submitted,

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