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 EDUCATION AND LIBRARIES NETWORK COALITION

The Education and Libraries Network Coalition ("EdLiNC") hereby comments on the

Commission's Notice of Proposed Rulemaking[1] regarding the Funding Year 2009 Eligible

Services List ("ESL") for the schools and libraries universal service support mechanism (the "E-

rate"). EdLiNC urges the Commission to forego adding filtering software and other non-

telecommunications services and non-information services to the ESL. Congress created the E-

rate to ensure that schools and libraries would have affordable access to advanced

telecommunications services and the Internet. Any new services added to the ESL must further

the Communications Act's goal of ensuring that schools and libraries have access to such services

at just, reasonable, and affordable rates. Adding products and services that are not

telecommunications services or information services to the list – even if otherwise socially

meritorious - would undermine the intention of the Act and place significant new pressure on the

Universal Service Fund at a time when applications already regularly exceed the E-rate's annual

$2.25 billion cap. Furthermore, applicant preparations for Funding Year 2009 are already well

underway, and changes to the ESL at this late date will present significant legal, regulatory and

practical challenges.

EdLiNC is a coalition of the nation's leading public and private education and library

associations formed in 1995 to advocate for the interests of schools and libraries during the

passage of the 1996 Telecommunications Act. EdLiNC's member organizations are committed to

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[1] *Schools and Libraries Universal Service Support Mechanism*, Notice of Proposed Rulemaking, FCC 08-
173, CC Docket No. 02-6 (2008).

maintaining the integrity and effectiveness of the E-rate program and to improving access to advanced telecommunications and information services for all schools and libraries, particularly for those institutions serving the nation's most economically disadvantaged populations.

I. Expanding the Eligible Services List Will Place Significant New Pressure on the Universal Service Fund at a Time When Applications for Covered Services Already Routinely Exceed the E-rate's $2.25 Billion Cap

Since 1998, the E-rate has provided more than $20 billion in discounted telecommunications services, Internet access, and internal connections to tens of thousands of schools and libraries. Each year, almost 40,000 applications are submitted to the Schools and Libraries Division of the Universal Services Administrative Company (USAC). Annual demand routinely exceeds the program's $2.25 billion spending cap. In fact, total estimated demand for Funding Year 2008 equaled $4.3 billion.[2]

Due to this demand, resources are insufficient to fund all of the E-rate applications currently being submitted. During the first years of the program, applicants timely applying for Priority One services for telecommunications and Internet access could expect to receive funding. Recently, however, demand for Priority One services has grown significantly and these services now consume a majority of the fund's resources. In 2003, Priority One services accounted for 43% of funding commitments, while in 2007 Priority One services accounted for 60% of funding commitments.[3] Estimated 2008 demand for Priority One services increased by 9.1% to $1.95 billion and the final Priority One allocation could amount to as much as 80% of the total funding commitment.[4]

After Priority One requests are funded, USAC turns to Priority Two applications and begins by funding applications eligible for the highest discount rates and distributing available

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[2] Funding Year 2008 Demand Estimate Letter ("Demand Estimate") from the Universal Service Administrative Company to Dana R. Shaffer, Chief, FCC Wireline Competition Bureau, February 29, 2008, p. 1.
[3] USAC Website: FY 2003 and 2007 Cumulative National Data. Website last visited on September 17, 2008.
[4] USAC Demand Estimate at 1.

funding until the resources are depleted. As the demand for Priority One services has grown, the funding available for Priority Two services has declined, and thus many economically disadvantaged schools and libraries are denied assistance. In 2003, Priority Two commitments totaled $1,532,994,346 or 56 % of the total amount committed. By 2007, Priority Two applications accounted for only 39% of the total amount committed, and the Priority Two share is expected to decrease again for Funding Year 2008.[5]

Congress's intent in authorizing the E-rate was to close the digital divide by ensuring that *all* schools and libraries would have access to advanced telecommunications and information services at just, reasonable and affordable rates. Within current program guidelines and demand, however, only schools and libraries at the most dire end of the poverty spectrum are provided with Priority Two access. Schools only slightly better off economically are denied help from the program, leaving many at risk students and economically disadvantaged communities unconnected. In Funding Year 2 (1999-2000), all valid requests for Priority Two services were funded. That is the only time Priority Two has been fully funded. In all other funding years, the funding threshold (the level below which applications are not funded) did not dip below the 70% discount level, and most years fell above the 80% level. The following table illustrates this challenge.

Funding Year	Poverty Level Threshold:
1 (1998-1999)	70%
2 (1999-2000)	All
3 (2000-2001)	82
4 (2001-2002)	86
5 (2002-2003)	81
6 (2003-2004)	70

[5] Ibid.

7 (2004-2005)	81
8 (2005-2006)	80
9 (2006-2007)	86
10 (2007-2008)	81
11 (2008-2009)	90 *(estimated)*

The inability of schools with high poverty rates to obtain funding for internal connections and basic conduit access to broadband services must be addressed prior to any expansion of the ESL that would allow use of the fund for content, equipment or services beyond the telecommunications and information services authorized by the Telecommunications Act of 1996.

II. EdLiNC Opposes the Commission's Proposal to Expand Eligible Services to Encompass Filtering Software

In reviewing the NPRM's varied and numerous proposals to expand the eligible services list, we feel constrained to single out for our strongest objection the proposal to allow scarce E-rate dollars to support filtering software. EdLiNC objects to this proposal on two major grounds: (1) a plain reading of the Children's Internet Protection Act (CIPA), an analysis of CIPA's legislative history, and the Commission's previous CIPA implementation orders demonstrate that E-rate applicants cannot use E-rate support to purchase filtering software[6]; and (2) the Commission's proposed expansion of the ESL ignores the E-rate's singular focus on connecting schools and libraries to advanced telecommunications and information services and would establish the dangerous precedent of allowing non-telecommunications and information services to receive E-rate support.

A plain reading of CIPA, an analysis of the law's legislative history, and the Commission's previous CIPA implementation Order demonstrate that E-rate applicants cannot

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[6] P.L. 106-554 (enacted December 21, 2000)

use E-rate support to purchase filtering software. The Children's Internet Protection Act, enacted on December 21, 2000, mandates that schools and libraries receiving E-rate support, among other things, must implement Internet safety policies that include using technology protection measures (e.g., filtering software) on any school or library computer with Internet access or internal connections to protect minors from accessing inappropriate content. Section 1721(g) of CIPA states that school and library E-rate recipients can use two particular funding sources – Title VI of the Elementary and Secondary Education Act of 1965 and Section 231 of the Library Services and Technology Act -- to purchase or acquire technology protection measures. The Act does not mention E-rate as a source of funding for technology protection measures. In fact, Section 1721(g) concludes by stating: "No other sources of funds for the purchase or acquisition of such measures are authorized by this title, or the amendments made by this title."

In 2001, the Commission issued an Order implementing CIPA that dealt squarely with the issue of whether E-rate support could be used for CIPA compliance. The Commission concluded that: "CIPA clearly prohibits recipients from obtaining discounts under the universal service support mechanism for the purchase of technology protection measures necessary for CIPA compliance."[7]

In the current NPRM, the Commission seeks comment on allowing E-rate support for filtering software, which is a technology protection measure. The NPRM seeks comment on whether the Commission's 2001 interpretation should be reinterpreted. Specifically, it asks: "whether the statute can be interpreted so that the Commission is not precluded from funding filtering software through the E-rate program." It also asks commenters to review CIPA's legislative history, noting that the Senate Commerce Committee report that accompanied the Senate approved version of the bill permitted E-rate support for CIPA compliance.

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[7]*Federal-State Joint Board on Universal Service, Children's Internet Protection Act*, CC Docket No. 96-45, Report and Order ("CIPA Order"), para. 54 (2001).

The plain reading of the statute shows that Congress intended to only allow two funding sources to support school and library purchases of technological protection measures and E-rate was – and is still – not one of them. Not only does the language specify using only the two non-E-rate funds for CIPA compliance, but its concluding clause demonstrates that Congress had no intention of permitting the E-rate – or any other federal funding sources – to be used for CIPA compliance. We take the Act's authors at their word when they clearly state that they do not authorize using any other funding sources for the Act's purposes. In our view, a plain reading here allows no room for an interpretation other than that Congress intended to limit CIPA compliance funding to the two funds named in the statute, thereby precluding E-rate support from being used for CIPA compliance.

Another entry point for divining legislative intent is the Act's legislative history. EdLiNC finds strong support here for its position opposing using E-rate for filtering software. The Commission notes that the Senate Commerce Committee's report on the Senate passed version of CIPA, S. 97, contained language that indicated that S. 97's framers desired E-rate applicants to use E-ate support for CIPA compliance. And, indeed the committee report contains such language, stating specifically that: "[E-rate] discounts may be applied to the purchase or acquisition of filtering or blocking products necessary to meet the requirements of the Act."[8] However, S. 97 did not become law in this form and the final, enacted version of CIPA added the funding limitation language of Section 1721(g). Therefore, it can be concluded that Congress made a conscious decision to add funding limitation language before passing CIPA and that the S.97 report language is material only because it demonstrates that Congress chose specifically to exclude language that would have allowed the use of E-rate for CIPA compliance.

EdLiNC also looked, as did the NPRM, at previous analyses of this same issue and – again – found support for its position. As noted above, the Commission addressed this same

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[8] Report of the Senate Commerce, Science and Transportation Committee on S.97, Report 106-141, August 5, 1999, p. 13.

issue only seven years ago and decided that CIPA did not allow for E-rate support of technological protection measures. At that time, the Commission not only stated that a plain reading of the statute supported its decision then – and our position now – but suggested that any different interpretation would have amounted to an executive branch usurpation of legislative branch authority. In direct, concise language, the Commission stated the following in 2001: "It is the role of the Commission only to interpret and implement the directives of Congress, and therefore, we have no authority to 'modify' CIPA. Nor are we empowered to deem eligible for universal service support other costs associated with the implementation of CIPA that are not otherwise eligible under Section 254 of the Act."[9]

The statute and the law's legislative history are clear that E-rate applicants cannot use E-rate support for CIPA compliance. Moreover, the Commission's previous holding could not be clearer on this issue. Therefore, EdLiNC urges the current Commission to heed the not so distant words of the previous Commission and not contravene the plain meaning and intention of CIPA.

The Commission's proposed expansion of the ESL would ignore the E-rate's purpose of providing access to advanced telecommunications and information services and create a further slippery slope by allowing E-rate support for new software services. EdLiNC members are extremely sensitive to the fact that many schools and libraries continue to rely, as a result of significant state and local budget shortfalls, on federal education technology dollars to operate their education technology programs and, more specifically, to purchase filtering software. And, federal education technology support for schools, mainly through the US Department of Education's Enhancing Education Through Technology (EETT) program, has endured significant cuts in the past several years. In fact, EETT appropriations for FY08 stand at only $267 million; a substantial reduction from the program's funding high-water-mark of $700.5 million. EdLiNC members have watched with dismay (and, in some cases, fought) this downturn in federal education technology funding. Thus, EdLiNC understands completely the Commission's impulse

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[9] CIPA Order, para. 55.

and good intentions in seeking to find other funding sources for the technology protection measures that CIPA mandates.

EdLiNC cannot, however, support the use of the E-rate to compensate for diminished federal education technology funding for a number of reasons. First, as noted above, the E-rate program is already oversubscribed for the services it currently offers and, adding any other eligible services – even those required by law to be deployed in conjunction with E-rate connectivity services – will drain E-rate's limited resources.

Second, Congress always intended that the E-rate be a telecommunications program focused on providing school and library participants with the essentials of access to advanced telecommunications and Internet services, not with furnishing support for every education technology-related service, software, training or device. The fact that Congress elected deliberately to include E-rate in the Telecommunications Act of 1996 and empowered the FCC to administer it, rather than using federal education legislation for its enactment and appointing the Department of Education as its steward, is proof positive that the E-rate's scope was supposed to be and remains limited to serving school and library telecommunications and Internet connectivity needs. The Telecommunications Act's Conference Report language buttresses this assertion by describing the E-rate's overriding aim as the provision of Internet access:

> The ability of K-12 classrooms, libraries and rural health care providers to obtain access to advanced telecommunications services is critical to ensuring that these services are available on a universal basis. The provisions of subsection (h) will help open new worlds of knowledge, learning and education to all Americans--rich and poor, rural and urban. They are intended, for example, to provide the ability to browse library collections, review the collections of museums, or find new information on the treatment of an illness, to Americans everywhere via schools and libraries…"[10]

Therefore, expanding the scope of E-rate support beyond connectivity-related services would be at variance with the E-rate's congressionally mandated scope.

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[10] Telecommunications Act of 1996 Conference Report, Report 104-458, January 31, 1996, p. 132.

Lastly, allowing filtering software as an E-rate eligible service would ignore the E-rate's purpose of providing access to advanced telecommunications and information services and create a further slippery slope by allowing E-rate support for new software services, thereby precipitating an avalanche of new E-rate support requests from participants for any of the multitudes of commercial software titles – including software for filtering, anti-virus protection and even pure educational content – available currently. This situation will not only possibly place the Universal Service Administrative Company (USAC) in the unfamiliar position of reviewing the eligibility of thousands of different software titles, but also slow down its application processing.

III. **EdLiNC Urges the Commission to Consider the Operational Challenges Associated With Modifying the Funding Year 2009 ESL**

Many applicants have already filed Form 470 to satisfy the FCC's competitive bidding requirements for Funding Year 2009. As the Commission knows, preparing Requests for Proposals, waiting for bid responses, evaluating responses, and entering into contracts prior to submitting Forms 471 requires significant time and resources. Additionally, applicants have completed technology plans, which are required to be prepared prior to the submission of the Form 470.

Numerous applicants are operating under multi-year agreements for E-rate eligible services. If the ESL is expanded, consideration must be given to contract changes that may be required, potential changes to existing Letters of Agency (which may not cover the new services), the necessity for new procurements and the impact new procurements may have on existing contracts and related penalties, and to the requirement to prepare or adjust technology plans prior to posting new Forms 470.

Given the complexities associated with some of the proposed services contemplated by the Commission in this proceeding, detailed explanations and training would be required to ensure that applicants had sufficient information to properly file forms—especially where category of

service issues may be impacted. The SLD starts training for Funding Year 2009 on September 11, 2008.   Since reply comments are not due until October 3, 2008, and therefore any decision would be subsequent to that date, it seems virtually impossible to provide the necessary information that would be required to ensure successful applications and the related FCC processes required to obtain new services.

   While we recognize that the FCC has the authority to waive their 60-day requirement to post an ESL prior to the opening of the application window, applicants can not waive the steps required to comply with program requirements. Therefore, we urge the FCC to reflect on these complexities and refrain from making changes at this late date that would impact Funding Year 2009.

IV. Conclusion

   Although the statute does not limit eligible services under the program to telecommunications services and information services, the "special" or "additional" services the Commission may choose to add to the Eligible Services List pursuant to Section 254(c)(3), must nonetheless further the core goals of the E-rate program. Adding peripheral products or services to the ESL would not only fail to further the Act's schools and libraries goals, applications for such services would divert scarce resources from applications that are designed to advance the Act's universal service objectives.   As described above, many applications annually go unfunded (almost $2 billion in applications for Funding Year 2008).   Social utility alone is not sufficient for new services to the (ESL). Furthermore, adding non telecommunications and information services would displace meritorious applications and could open the door to adding other peripheral services to the list that would further compound the pressure on the fund. For the above reasons, EdLiNC urges the Commission to forego adding services to the ESL.